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A 1966 report of the U.S. Commission on Civil Rights deals with the status of school desegregation standards under Title VI of the Civil Rights Act of 1964. The document reviews the judicial context of the rate and method of desegregation and describes the statement of policies issued by the U.S. Office of Education (OE). Also included are information about implementation of the policy statement, freedom of choice plans, and the compliance efforts of OE. The Commission's findings show that "not more than one Negro child out of every 13 in the Deep South actually attends school with white children." Moreover, this maintenance of school segregation is attributed to the manner in which free choice plans have operated in the South. OE is also criticized for its standards of acceptance of compliance plans and its failure to institute enforcement proceedings. The Commission offers eight recommendations for strengthening OE policies and procedures to assure compliance with existing laws. (NH)

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U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
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Survey of SCHOOL DESEGREGATION in the Southern and Border States 1965-66

UD 008 136

A Report of the United States Commission on Civil Rights
February 1966

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LETTER OF TRANSMITTAL

THE U.S. COMMISSION ON CIVIL RIGHTS
Washington, D.C., February 1966

THE PRESIDENT
THE PRESIDENT OF THE SENATE
THE SPEAKER OF THE HOUSE OF REPRESENTATIVES

SIRS:

The Commission on Civil Rights presents to you this report pursuant to Public Law 85–315 as amended.

The survey presents and analyzes information covering school desegregation in the Southern and border States during the 1965–66 school year under Title VI of the Civil Rights Act of 1964. This information was obtained by the Commission from investigations conducted in 1965, as well as from other sources. The Commission has found that while many previously segregated school districts adopted a policy of desegregation for the first time during the school year 1965–66, the number of Negro children in the Deep South who are actually attending school with whites is still very low. The Commission's recommendations deal principally with improving the policies and procedures for monitoring compliance with Title VI and ensuring that the standards established by the Office of Education are adequate to disestablish fully the dual, racially segregated school systems involved.

We urge your consideration of the facts presented and the recommendations for corrective action.

Respectfully yours,

JOHN A. HANNAH, *Chairman*
EUGENE PATTERSON, *Vice Chairman*
FRANKIE M. FREEMAN
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PREFACE

Title VI of the Civil Rights Act of 1964 bans racial discrimination in programs and activities receiving Federal financial assistance and authorizes Federal agencies to impose sanctions for noncompliance, including the withholding of Federal funds. The law has a major impact upon the desegregation of public schools, for the schools of the Nation receive aid under several Federal programs.

This survey shows that in 1965 significant progress was made under Title VI in obtaining the agreement of school districts to desegregate their schools but the number of Negro children actually attending school with white children in the Deep South is still very small.

Following the opening of schools in the fall of 1965, the Commission undertook a field study in an effort to identify the principal obstacles encountered in the desegregation of elementary and secondary schools in the Southern and border States. Because there are nearly 5,000 school districts in these States, it was possible for the Commission's staff to visit only a cross section of school districts. While the information gathered by field study has been supplemented by data received from other governmental and nongovernmental agencies, this survey is not an all-inclusive report of the status of school desegregation throughout the Southern and border States. It does contain reports of some of the progress made, identification of some of the principal barriers to obtaining further progress, and recommendations for corrective action.

This survey is also limited to the kinds of problems of school desegregation encountered in the 17 Southern and border States which prior to 1954 required by law the maintenance of dual, racially segregated school systems. In so limiting the survey, the Commission recognizes that the eradication of school segregation imposed by State law will not necessarily resolve all the issues which may be raised concerning the validity of a school system's assignment policies. The elimination of legally required segregation may result only in bringing a school system to the level of many systems in the North where, notwithstanding the absence of any history of State laws requiring segregation, most Negro students and most white students are isolated from each other in separate schools. The causes and effects of such isolation will be explored fully in response to the request made to the Commis-

sion by the President on November 17, 1965, to gather the facts on "racial isolation in the schools . . . both in the North and the South—because of housing patterns, school districting, economic stratification and population movements" and to study the effect of such isolation in inhibiting quality education for all.

I. INTRODUCTION

In the 1954 school desegregation cases the U.S. Supreme Court, stressing the significance of education, ruled that public school segregation required or permitted by State law was unconstitutional, on the ground that "though the physical facilities and other 'tangible' factors may be equal, . . ." [1] "separate educational facilities are inherently unequal." [2] The court commented: [3]

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

In 1955, the Supreme Court implemented its decision. It gave the Federal district courts the responsibility of supervising the disestablishment of the dual and separate school systems of the Southern and border States, all of which required or permitted school segregation by constitutional or statutory provision.[4] Desegregation was to take place "with all deliberate speed." [5] But progress was slow. In 1964, nine years after the second *Brown* decision, there were still school districts which had not yet initiated a plan of desegregation.[6]

In 1964, with only 2.25 percent of the Negro children in the 11 States of the Confederacy and 10.9 percent in the entire region encompassing the Southern and border States attending school with white children,[7] with 1,555 biracial school districts out of 3,031 still fully segregated,[8] and with 3,101,043 Negro children in the region attending all-Negro

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[1] *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, 493 (1954).
[2] *Id.* at 495.
[3] *Id.* at 493.
[4] See *Report of the United States Commission on Civil Rights, 1959*, at 158.
[5] *Brown* v. *Board of Education of Topeka*, 349 U.S. 294, 301 (1955).
[6] See Southern Education Reporting Service (SERS), Statistical Summary 2, Nov. 1964.
[7] *Id.* Dec. 1965 at 29.
[8] *Ibid.*

schools,[9] Congress enacted the Civil Rights Act of 1964.[10] This statute heralded a new era in school desegregation. For the first time the U.S. Attorney General was given statutory authority to intervene in school desegregation suits (Title IX),[11] and, upon receipt of a complaint, to initiate such suits (Title IV).[12] Most significantly, however, Federal power was to be brought to bear in a manner which promised speedier and more substantial desegregation than had been achieved through the voluntary efforts of school boards and district-by-district litigation. Title VI of the act banned discrimination on the ground of race, color, or national origin in federally assisted programs[13]—among which were several programs under which money was funneled into the Nation's public school systems.

Title VI authorized and directed each Federal department and agency administering a program of Federal financial assistance to effectuate the nondiscrimination ban by regulations and provided remedies for noncompliance, among which were the refusal or termination of the assistance.[14] The Commissioner of Education administers 13 Federal programs providing money for the Nation's public school systems, including aid for vocational education, aid for federally impacted areas, and the National Defense Education Act programs.[15] During fiscal year 1964, $176,546,992 was distributed to State and local school agencies in the 17 Southern and border States.[16] The passage of the Elementary and Secondary Education Act of 1965[17] added an additional appropriation of $589,946,135 for allocation to the 17 Southern and border States for fiscal year 1966.[18] With funds of such magnitude at stake, most school systems would be placed at a serious disadvantage by termination of Federal assistance.

General regulations implementing Title VI were published by the Department of Health, Education, and Welfare in December 1964,

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[9] *Ibid.*
[10] 42 U.S.C. § 1971, 1975, 2000 (1964).
[11] 42 U.S.C. § 2000b–2 (1964).
[12] 42 U.S.C. § 2000c–6 (1964).
[13] 42 U.S.C. § 2000d (1964).
[14] 42 U.S.C. § 2000d–1 (1964).
[15] Vocational Education Act of 1917 (Smith-Hughes Act), 20 U.S.C. 11 (1964); Vocational Education Act of 1946 (The George-Barden Act), 20 U.S.C. 151 (1964); Vocational Education Act of 1963, 20 U.S.C. 35 (1964); Financial Assistance for Areas Affected by Federal Activities, 20 U.S.C. 236 (1964); School Construction in Areas Affected by Federal Activities, 20 U.S.C. 631 (1964); National Defense Education Act, 20 U.S.C. 401 (1964).
[16] Figures obtained for each program from U.S. Office of Education, Budget Branch, Office of Administration (Dept. H.E.W), Nov. 24, 1965.
[17] 79 Stat. 27 (1965).
[18] U.S. Office of Education, Budget Branch, Office of Administration (Dept. H.E.W), "Elementary and Secondary Educational Activities Fiscal Year 1966 Authorization."

to become effective in January 1965.[19] In April 1965, the Office of Education established standards for school desegregation in a document entitled "General Statement of Policies Under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools."

[19] "Nondiscrimination in Federally-Assisted Programs of the Department of Health, Education, and Welfare—Effectuation of Title VI of the Civil Rights Act of 1964," 45 C.F.R. 80 (1964).

II. THE JUDICIAL CONTEXT

In promulgating standards to govern school desegregation, the Office of Education was required to make choices—including choices with respect to the rate of desegregation and the substantive standards by which it could be determined whether the method of pupil assignment was acceptable. The legislative history of Title VI does not make clear what relationship, if any, was contemplated by Congress between the standards to be established by the Office of Education and the body of judicial decisions in the area of school desegregation. It appeared, however, that Congress wanted the Title VI standards applied across the board. As Senator Pastore, floor manager of Title VI, said in debate, "there could not be one rule for Rhode Island and another one for South Carolina and another one for California. The rules and regulations which are made must be uniform, on a nationwide basis, to apply to all people of the country." [20] The necessary corollary was that, if a particular decision of a Federal court of appeals or a Federal district court conflicted with the decision of another lower Federal court, the Office of Education was free to disregard at least one of them.

The legislative history did not make it clear whether the Office of Education was bound to follow lower Federal court decisions with respect to which there was no conflict. Nor did the legislative history make clear the relationship, if any, of the Supreme Court decisions to the Office of Education standards.

Regardless of how these questions should be answered, it is apparent that the Statement of Policies was adopted in the context of a body of desegregation law which inevitably influenced administrative choices. It is therefore appropriate, in analyzing the Statement of Policies, to cast a backward glance at that body of law.

In *Brown* v. *Board of Education of Topeka*,[21] in 1954, the Supreme Court ruled that educational facilities operated on the basis of race were "inherently unequal" and thus constituted a denial of equal protection of the laws as guaranteed by the 14th amendment to Negro children. The *Brown* decision thus invalidated the "separate but equal" doctrine as applied to public education. The Court did not, however, at the time of the decision, set forth the manner in which

[20] 110 Cong. Rec. 6047 (1964).
[21] *Supra* note 1.

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Southern schools were to be desegregated. Instead, a year later the Court heard further argument on the nature of the decree necessary to implement its decision and subsequently remanded the cases to the Federal district courts in which the cases originated. The district courts were directed to fashion decrees which would provide for all steps "necessary and proper to admit [the Negro plaintiffs] to public schools on a racially nondiscriminatory basis with all deliberate speed. . . ." [22] The Court recognized the necessity for a gradual adjustment from the existing segregated system to a nondiscriminatory system and therefore did not establish guidelines for implementation of its ruling but left the problem of assuring compliance with the constitutional mandate to the lower Federal courts. Such questions as the minimum rate of desegregation, the permissible method of desegregation, and, for that matter, what constitutes desegregation were left open.

A. Rate of Desegregation

The second *Brown* decision required "a prompt and reasonable start toward full compliance." A delay was authorized only if the school district could "establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date." [23] The factors which the courts could consider were:

> . . . problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems.[24]

The burden was on the school board to establish hardship. The Court stated that "it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." [25] Subsequently, the Court confirmed that community hostility was not an acceptable reason for delaying school desegregation.[26]

Some courts required the admission of Negro students immediately. For example the Court of Appeals for the Third Circuit rejected a grade-a-year plan for those districts not yet desegregated in Delaware and ordered immediate admission for all Negro students in all grades who wished to attend formerly all-white schools. The court held that the slower rate applicable in the South did not apply in Delaware because it was further along "upon the road toward full integration

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[22] *Brown* v. *Board of Education of Topeka, supra* note 5.
[23] *Id.* at 300.
[24] *Id.* at 300, 301.
[25] *Id.* at 300.
[26] *Cooper* v. *Aaron*, 358 U.S. 1 (1958).

. . .".[27] Similarly, a court in Virginia ordered immediate desegregation in all grades.[28]

Nevertheless, during 1959 and 1960, grade-a-year plans were being approved in many States.[29] In 1961, it was held that if a school district had delayed desegregation while a neighboring district had begun, the first district was required, in a single step, to desegregate all grades already desegregated by its neighbor.[30]

Another development occurred in 1962, when the Fifth Circuit Court of Appeals ordered into effect a plan whereby all requests for transfer would be considered without regard to race.[31] Answering in part the objection that a grade-a-year plan beginning with the first grade precludes a desegregated education for those above grade 1 in the year when desegregation commences, the order included requests for transfer of Negro students into formerly all-white schools in grades above those being currently desegregated. Two Sixth Circuit decisions had refused to allow such transfers on the theory that the "smooth working of a plan could be thwarted by a multiplicity of suits by individuals seeking admission to grades not yet reached in the desegregation plan." [32]

In 1962, the Sixth Circuit said: [33]

> We do not think that the twelve-year plan of desegregation adopted at this late date meets either the spirit or specific requirements of the decisions of the Supreme Court.

In 1963 the Supreme Court observed: [34]

> Given the extended time which has elapsed, it is far from clear that the mandate of the second *Brown* decision requiring that desegregation proceed with "all deliberate speed" would today be fully satisfied by types of plans or programs for desegregation of public educational facilities which eight years ago might have been deemed sufficient.

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[27] *Evans* v. *Ennis*, 281 F. 2d 385, 393 (3d Cir. 1960), *cert. denied*, 364 U.S. 933 (1961).

[28] *Blackwell* v. *Fairfax County School Board*, Civil No. 1967, E.D. Va., Sept. 22, 1960, 5 *Race Rel. L. Rep.* 1056 (1960).

[29] E.g., *Kelley* v. *Board of Education of the City of Nashville*, 270 F. 2d 209 (6th Cir. 1959) (beginning with grade 1), *cert. denied*, 361 U.S. 924 (1959); *Calhoun* v. *Members of the Board of Education, City of Atlanta*, Civil No. 6298, N.D. Ga., Dec. 30, 1959, Jan. 19, 20, 1960, 5 *Race Rel. L. Rep.* 56, 59, 65, 70 (1960) (beginning with grade 12).

[30] *Vick* v. *Board of Education of Obion County*, Civil No. 1259, W.D. Tenn., Dec. 15, 1961, 6 *Race Rel. L. Rep.* 1001 (1961); *Maxwell* v. *County Board of Education of Davidson County*, 203 F. Supp. 768 (M.D. Tenn. 1960), 301 F. 2d 828 (6th Cir. 1962), *modified*, 373 U.S. 683 (1963).

[31] *Augustus* v. *Board of Public Instruction of Escambia County*, 306 F. 2d 863 (5th Cir. 1962).

[32] *Maxwell* v. *County Board of Education of Davidson Co.*, 301 F. 2d 828, 829 (6th Cir. 1962), *modified*, 373 U.S. 683 (1963); *Goss* v. *Board of Education of the City of Knoxville*, 301 F. 2d 164 (6th Cir. 1962), *rev'd on other grounds*, 373 U.S. 683 (1963).

[33] *Goss* v. *Board of Education of the City of Knoxville*, 301 F. 2d 164, 167 (6th Cir. 1962), *rev'd on other grounds*, 373 U.S. 683 (1963).

[34] *Watson* v. *City of Memphis*, 373 U.S. 526, 530 (1963).

In the same year, the Fourth Circuit refused to allow one district 12 years to desegregate.[35] And many decisions in the border States ordered immediate desegregation.[36]

In 1964, in the Prince Edward County case, the Supreme Court said "there has been entirely too much deliberation and not enough speed in enforcing the constitutional rights which we held in *Brown* v. *Board of Education*, *supra*, had been denied Prince Edward County Negro children." [37]

The Court has also said: [38]

> We are not unmindful of the deep-rooted problems involved. Indeed, it was consideration for the multifarious local difficulties and "variety of obstacles" which might arise in this transition that led this Court eight years ago to frame its mandate in *Brown* in such language as "good faith compliance at the earliest practicable date" and "all deliberate speed" *Brown* v. *Board of Education*, 349 U.S. at 300, 301 . . . . Now, however, eight years after the first *Brown* decision, the context in which we must interpret and apply this language to plans for desegregation has been significantly altered.

Other courts of appeals accordingly held that grade-a-year plans were no longer acceptable. In the Sixth Circuit it was held that a grade-a-year plan for Memphis was too slow, and that Memphis must complete the desegregation of the six remaining segregated grades within two years.[39] The Fifth Circuit set "minimum standards" by which desegregation would be accomplished at the rate of three grades the first year and two grades per year thereafter.[40] Subsequently, the Fifth Circuit accelerated the rate of desegregation under a Muscogee County, Ga., plan after the district court had approved a one grade per year transfer plan beginning with the 12th grade in 1964. The Court stated that "the rule has become: the later the start, the shorter the time allowed for [full] transition," and held that Muscogee County was required to desegregate the first grade in 1965 and that September 1968 was the maximum additional time to be allowed for the inclusion of all grades in the plan.[41]

In 1965, subsequent to the adoption of the Statement of Policies, the Supreme Court declared that "more than a decade has passed since we directed desegregation of public school facilities 'with all

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[35] *Jackson* v. *School Board of the City of Lynchburg*, 321 F. 2d 230 (4th Cir. 1963).

[36] *Walker* v. *Richmond, Board of Education*, Civil No. 241, E.D. Ky., June 14, 1963, 8 *Race Rel. L. Rep.* 950 (1963); *Davis* v. *Board of Education of Charleston Consolidated School District No. 7 of Mississippi County*, 216 F. Supp. 295 (E.D. Mo. 1963); *Mason* v. *Jessamine County Board of Education*, Civil No. 1496, E.D. Ky., Jan. 20, 1963, 8 *Race Rel. L. Rep.* 75 (1963).

[37] *Griffin* v. *County School Board*, 377 U.S. 218, 229 (1964).

[38] *Calhoun* v. *Latimer*, 377 U.S. 263, 264 (1964).

[39] *Northcross* v. *Board of Education of the City of Memphis*, 333 F. 2d 661 (6th Cir. 1964).

[40] *Armstrong* v. *Board of Education of the City of Birmingham*, 333 F. 2d 47 (5th Cir. 1964).

[41] *Lockett* v. *Board of Education of Muscogee County School District*, 342 F. 2d 225, 228 (5th Cir. 1965). The same schedule was required of Bibb County, Georgia, *Bivins* v. *Board of Public Education and Orphanage of Bibb County*, 242 F. 2d 229 (5th Cir. 1965).

deliberate speed,' . . . . Delays in desegregation of school systems are no longer tolerable." [42] The Court repeated this statement again when it ordered the Fort Smith, Ark., district to give immediate relief to Negro petitioners who had been assigned to a Negro high school on the basis of race.[43] The Court relied also upon the fact that the petitioners were prevented from taking certain courses offered only at another high school limited to white students.

In *Kemp* v. *Beasley*, the school district had initiated a freedom of choice plan which would cover all 12 grades by the 1968–69 school year. The Eighth Circuit held that the rate was not fast enough and ordered that the district be completely desegregated by the 1967–68 school year.[44]

B. Method of Assignment

The *Brown* decision did not specify what constituted "desegregation"—wholly apart from what constituted an adequate speed for achieving it. Several kinds of plans emerged, basically falling into three categories:

(1) rezoning of attendance areas for all schools, white and Negro (all pupils residing within a delineated area are automatically assigned to the school therein).

(2) individual pupil assignment (each pupil is judged by established criteria and assigned to the school determined to be appropriate).

(3) free choice of school (all schools in the system or within a particular area are open to any eligible pupil without regard to race or residence).

1. Rezoning Attendance Areas

The attendance zone is a traditional method of apportioning students among schools. At the time when the Statement of Policies was adopted, however, the courts had held that attendance zone lines could not be gerrymandered to preserve segregation.[45] In *Wheeler* v. *Durham City Board of Education*, the district court ordered desegregation of the city schools after having found that school zone lines had "been drawn along racial residential lines, rather than along natural boundaries or the perimeters of compact areas surrounding the particular schools." [46] The Sixth Circuit had decided that "disturbing the people as little as possible" and preserving school loyalties were improper criteria and could not be used in drawing lines, *North-*

[42] *Bradley* v. *School Board of the City of Richmond*, 15 L ed 2d 187, 188, 189 (1965).
[43] *Roger* v. *Paul*, 15 L ed 2d 265, 267 (1965).
[44] 352 F. 2d 14, 20 (8th Cir. 1965).
[45] *Bush* v. *Orleans Parish School Board*, 230 F. Supp. 509 (E.D. La. 1963); *Northcross* v. *Board of Education of City of Memphis*, *supra* note 39.
[46] Civil No. C–54–D–60, M.D. N.C., August 3, 1964.

cross v. *Board of Education of City of Memphis*, 333 F. 2d 661, 664 (6th Cir. 1964.)

In the same case the court had held that the burden of proof is on the school district to demonstrate that the lines were not drawn for the purpose of preserving segregation. District courts had divided on this issue.[47]

Most school districts desegrating under a geographic attendance zone plan included some provision for voluntary transfer. One type of transfer provision gives the student the right to request a transfer to any other school of the appropriate grade level, limited only by the capacity of the school selected.

Other transfer provisions limit transfers by standards which vary from plan to plan. Under a plan approved by the Sixth Circuit in 1959 for Nashville, Tenn., a student was entitled to a transfer from the school in which the rezoning placed him, if he found himself assigned to a school that previously served the other race, or to a school or class in which members of the other race were in the majority. In approving the plan the court seems to have considered the provision only as a device which permitted Negro students to retreat to segregation and not as one which permitted white students to escape from desegregation.[48] White students could transfer out of schools formerly serving only Negroes or mostly Negroes, recreating segregation from which, under the rule, Negro students could not escape. In four years of operation in Nashville, all white children exercised their right to transfer from formerly all-Negro or predominantly Negro schools, leaving the enrollment completely Negro.[49] The original assignment was not based on race but the transfer right was.

The minority transfer rule, as it is called, was widely adopted,[50] but in 1963 the Supreme Court held such a provision unconstitutional on the ground that "the transfer system proposed lends itself to perpetuation of segregation." [51]

Subsequent to the adoption of the Statement of Policies a Federal district court in Oklahoma required the Oklahoma City School Board to incorporate in its geographic zoning desegregation plan a new "majority to minority" transfer provision which would "enable all pupils assigned to schools where their race predominates (more than 50 percent) to obtain transfer, for that reason, space permitting, to schools

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[47] *Davis* v. *Board of Education of Charleston Consolidated School District No. 7 of Mississippi County, supra note* 36; *Bush* v. *Orleans Parish School Board, supra* note 45.

[48] *Kelley* v. *Board of Education of the City of Nashville*, 270 F. 2d 209, 229 (6th Cir. 1959), *cert. denied*, 361 U.S. 924 (1959).

[49] Southern School News, Oct. 1960, p. 5.

[50] *Goss* v. *Board of Education of the City of Knoxville*, 186 F. Supp. 559 (E.D. Tenn. 1960); 301 F. 2d 164 (6th Cir. 1962), *rev'd*, 373 U.S. 683 (1963); *Maxwell* v. *County Board of Education of Davidson County, supra* note 30; *Mapp* v. *Board of Education of the City of Chattanooga*, Civil No. 3564, E.D. Tenn., Oct. 21, 1960, 5 *Race Rel. L. Rep.* 1035 (1960).

[51] *Goss* v. *Board of Education of Knoxville*, 373 U.S. 683, 686 (1963).

where their race is in the minority (less than 50 percent)." [52] The facts of the *Dowell* case showed that there were all-Negro schools which were the result, in part, of laws requiring segregation in housing and education. A report prepared by court-appointed experts had declared that "inflexible adherence to the neighborhood school policy in making initial assignments serves to maintain and extend school segregation by extending areas of all Negro housing, destroying in the process already integrated neighborhoods and thereby increasing the number of segregated schools." [53] The court concluded that "the existence of segregated residential patterns make necessary at the very least, a transfer policy which enables pupils to transfer to schools outside the school of their residence where the majority of pupils are of a different race or color," [54] enabling Negro students trapped in Negro schools to transfer out and obtain an integrated education.

2. Pupil Placement

Subsequent to the *Brown* decision,[55] all of the Southern States adopted pupil placement laws.[56] These laws give either State or local officials the authority to assign students according to certain specified criteria other than race. Under the Alabama law, which served as a model, local school officials were directed to consider many factors before assigning a student to a particular school,[57] including (1) available facilities, including staff and transportation; (2) school curricula in relation to the academic preparation and abilities of the individual child; (3) the pupil's personal qualifications, such as health, morals, and home environment; and (4) the effect of the admission of the particular pupil on the other pupils and the community. Under these laws, the parent or guardian of any pupil could request his transfer to another school after the appropriate board had made an original assignment.

On their face the pupil placement laws were not invalid.[58] In practice most school boards initially assigned all students by race under the pupil placement laws, subject to the right of any student to apply for reassignment. By the time of the adoption of the Statement of

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[52] *Dowell* v. *School Board of Oklahoma City Public Schools*, 244 F. Supp. 971, 977 (W.D. Okla. 1965).

[53] *Ibid.*

[54] *Ibid.*

[55] *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954).

[56] Ala. Acts 1955, vol. 1, No. 201, p. 492; Ark. Acts 1959, vol. 2, No. 461, p. 1827; Fla. Laws 2d Ex. Sess. 1956, ch. 31380, p. 30; Ga. Laws 1961, H. Res. No. 225; La. Acts 1958, Act No. 259, p. 856; Miss. Acts 1960, S. Bill Nos. 2010 1900; N.C. Laws Ex. Sess. 1956, ch. 7, p. 14; S.C. Acts 1955, No. 55, p. 83; Tenn. Acts 1957, ch. 13, p. 40; Tex. Acts 1957, ch. 287, p. 683; Va. Acts 1958, ch. 500, p. 638, as amended by Va. Acts Ex. Sess. 1959, ch. 71, p. 165.

[57] Ala. Acts 1955, vol. 1, No. 201, p. 492.

[58] See *Shuttlesworth* v. *Birmingham Board of Education*, 162 F. Supp. 372 (N.D. Ala. 1958), *aff'd per curiam*, 358 U.S. 101 (1958).

Policies, courts had refused to countenance this application of the pupil placement laws. In 1960, the Eighth Circuit held that placement standards could not be devised or applied "to preserve an existing system of imposed segregation." [59] In 1961, the Fourth Circuit held that initial assignments based on race violate the 14th amendment even though there are provisions for transfer.[60] In 1962, a district court found that under the Louisiana pupil placement law, the school board assigned children to racially segregated schools in their residential areas, and that "after being so assigned, each child wishing to exercise his right to elect pursuant to the court's plan of desegregation was subjected to the testing program. . . ." [61] The Fifth Circuit, quoting the district court, said:

> . . . this failure to test all pupils is the constitutional vice in the Board's testing program. However valid a Pupil Placement Act may be on its face, it may not be selectively applied. Moreover, where a school system is segregated there is no constitutional basis whatever for using a Pupil Placement Law. A Pupil Placement Law may only be validly applied in an integrated school system, and then only where no consideration is based on race.[62]

3. Freedom of Choice Plans

Freedom of choice plans usually provide either that a pupil in a grade reached by the plan has a choice of attending any school in the system or that he may attend any school within a geographic attendance area, subject in either case to limitations of space.

Before the Statement of Policies was issued several school systems had tried unsuccessfully to obtain court approval of desegregation plans offering a choice between schools which were racially segregated by law and schools which were nonsegregated. These districts relied on the proposition that segregation by choice was constitutionally acceptable. In *Kelley* v. *Board of Education of Nashville*,[63] such a plan was rejected on the ground that a choice between a segregated and nonsegregated school was merely a preliminary step toward the establishment of schools based on racial distinctions—white as well as Negro students would be barred from some school on the basis of race alone. A "salt and pepper" plan for Houston, Tex., which called for the opening of 1 high school, 1 junior high school, and 1 elementary school, out of a total of 173 schools, to voluntary enrollments by both whites and Negroes was held to be "a palpable sham and subterfuge

[59] *Dove* v. *Parham*, 282 F. 2d 256, 258 (8th Cir. 1960).
[60] *Dodson* v. *School Board of Charlottesville*, 289 F. 2d 439 (4th Cir. 1961).
[61] *Bush* v. *Orleans Parish School Board*, 204 F. Supp. 568, 570 (E.D. La. 1962).
[62] *Bush* v. *Orleans Parish School Board*, 308 F. 2d 491, 495 (5th Cir. 1962).
[63] 159 F. Supp. 272 (M.D. Tenn. 1958).

designed only to accomplish further evasion and delay." [64] Another "salt and pepper" plan for Dallas, Tex., similar to that of Houston, was approved [65] but struck down on appeal.[66] The court rejected the plan because some segregation would be required by law.

Most courts, however, had upheld the validity of freedom of choice plans providing for a choice among schools not segregated by law. In 1962 the Fifth Circuit approved an option plan for New Orleans under which children could attend the formerly all-white public school nearest their homes or the formerly all-Negro schools nearest their homes, at their option.[67] In 1964, in the *Gaines* case, the Fifth Circuit directed the entry of an injunction requiring that in the Dougherty County school system, for the fall term 1964, "each child attending the first grade . . . shall have the choice of attending either the nearest formerly Negro school, or the nearest formerly white school, provided that if there is insufficient space in any school as a result of the making of such choice, preference in granting such choice, shall be solely on the basis of proximity of the child to the school." The 12th grade also was covered by this provision, with other grades to follow in succeeding years.[68] Also in 1964, in the *Stell* case, the Fifth Circuit sanctioned a provision for "freedom of choice, with schools no longer being designated as white or Negro, in the grades to which the plan of desegregation has reached. . . ." [69] A space-limitation rule similar to that announced in the *Gaines* case was announced.[70] In 1965, the Fifth Circuit held that a "quasi-freedom of choice" plan was acceptable if within the teaching of the *Stell* and *Gaines* cases.[71]

The Fourth Circuit also had sustained the validity of freedom of choice plans. In a case involving the Richmond schools the court had held that a free choice plan under which a pupil was given an unqualified right to transfer to the school of his choice (subject to capacity, which at that time was not a restrictive factor) was an acceptable device for achieving desegregation.[72] The court required, however, that discrimination in initial assignments be eliminated.[73]

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[64] *Ross* v. *Peterson*, Civil No. 10,444, S.D. Tex., Aug. 3, 12, 1960, 5 *Race Rel. L. Rep.* 703, 711 (1960).
[65] *Borders* v. *Rippy*, 184 F. Supp. 402 (N.D. Tex. 1960).
[66] *Sub nom., Boson* v. *Rippy*, 285 F. 2d 43 (5th Cir. 1960).
[67] *Bush* v. *Orleans Parish School Board*, *supra* note 62, at 502.
[68] *Gaines* v. *Dougherty County Board of Education*, 334 F. 2d 984, 985 (5th Cir. 1964).
[69] *Stell* v. *Savannah-Chatham County Board of Education*, 333 F. 2d 55, 65 (5th Cir. 1964), *cert. denied*, 379 U.S. 933 (1964).
[70] *Ibid.*
[71] *Lockett* v. *Board of Education of Muscogee County School District*, *supra* note 41; *Bivins* v. *Board of Public Education and Orphanage for Bibb County*, *supra* note 41.
[72] *Bradley* v. *School Board of the City of Richmond*, 345 F. 2d 310 (4th Cir. 1965), *rev'd on other grounds*, 15 L ed 2d 187 1965).
[73] *Id.* at 319. See also *Buckner* v. *County School Board of Greene County*, 332 F. 2d 452 (4th Cir. 1964).

Judges Sobeloff and Bell, in a concurring opinion, expressing doubt that the plan qualified as a plan of desegregation, concurred tentatively on the assumption that the plan was an "interim measure" only and would be subject to full review and reappraisal either at the end of the 1964–65 school year or at the beginning of the 1965–66 school term.

The Sixth Circuit appeared to differ from the Fourth Circuit in 1962, when it considered the validity of a Memphis free transfer plan in a biracial school system. The defendants argued that the resulting segregation was not attributable to compulsion by the defendants, but was voluntary because Negro parents and pupils did not avail themselves of the transfer provisions. Striking down the plan, the Sixth Circuit said:

> Minimal requirements for non-racial schools are geographic zoning, according to the capacity and facilities of the buildings and admission to a school according to residence as a matter of right.[74]

Thus, Federal district courts in Kentucky (in the Sixth Circuit) rejected "freedom of choice" plans (widely adopted voluntarily by Kentucky school boards in the 1950's) as tending to perpetuate segregation, and required geographic zoning.[75] In 1964, however, the Western District of Tennessee upheld a freedom of choice plan, concluding:[76]

> While the Northcross opinion does state that unitary geographical zones should be established for each school in the City of Memphis, we do not believe the Court thereby held that geographical zones must be established in all cases. Certainly varying fact situations, including the non-existence of a history of geographical zoning, call for varying solutions. Under the Memphis plan for desegregation before the Court for review in Northcross, the then existing dual system of zoning for Negro and white schools would continue with the right of pupils of both races to apply for a transfer to a school of the opposite race under the Tennessee Pupil Assignment Law. We believe that the Court in Northcross intended to hold only that if geographical zones were to be used, the zones must be unitary and non-racial, and that it did not intend to hold the zones must always be employed.

The court held that "a plan for admissions and transfer based on race and voluntary choice is constitutional with or without geographical zoning.[77]

Courts upholding freedom of choice plans imposed certain conditions in addition to the condition that where space limitations preclude

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[74] *Northcross* v. *Board of Education of City of Memphis*, 302 F. 2d 818, 823 (6th Cir. 1962), *cert. denied*, 370 U.S. 944 (1962).

[75] *Mack* v. *Frankfort Board of Education*, Civil No. 216, E.D. Ky., June 17, 24, and July 3, 1963, 8 *Race Rel. L. Rep.* 945 (1963); *Mason* v. *Jessamine County Board of Education*, Civil No. 1496, E.D. Ky., June 3, 10, 1963, 8 *Race Rel. L. Rep.* 530 (1963).

[76] *Monroe* v. *Board of Commissioners of City of Jackson*, 229 F. Supp. 580, 583 (W.D. Tenn. 1964).

[77] *Id.* at 584. See also the court's decision in the same case, 221 F. Supp. 968, 971 (W.D. Tenn. 1963) and *Vick* v. *County Board of Education of Obion County*, 205 F. Supp. 436 (W.D. Tenn. 1962).

honoring the choice of all pupils at the favored school, preference must be given to those residing nearest that school.[78] Clear and timely notice, together with ample time to make application, were required.[79] Burdensome administrative requirements, such as the notarization of applications for assignment or transfer, were forbidden.[80]

In *Vick* v. *County Board of Education of Obion County*,[81] the plaintiffs argued that there could be no free choice "as a practical matter." They offered proof that in rural Obion County, Negroes generally occupied a subservient economic position and that consequently economic pressure would be brought to bear upon the Negro parents to prevent the exercise of a free choice. In rejecting plaintiffs' argument, the court declared:[82]

> However, while conceding this possibility, this Court cannot now rule, as a matter of law, that the provision allowing a choice is unconstitutional because there is a possibility there will be such pressure which may prove to be effective. In the event that, upon the registration of the Negro students in June, it should appear that economic or other pressure, overtly or covertly, is brought to bear on the Negro parents and students, this Court, having retained jurisdiction, might find it necessary to eliminate the choice provision from the plan in order to effectuate the mandate of the Supreme Court in the Brown decisions.

At the time the Statement of Policies was issued, then, most courts had upheld free choice plans on their face, although leaving the way open to challenge such plans in the particular context in which they were applied.

Subsequent to the adoption of the Statement of Policies, the Eighth Circuit in *Kemp* v. *Beasley*, tentatively approved a freedom of choice plan as a method of desegregation but said:[83]

> . . . it is still only in the experimental stage and it has not yet been demonstrated that such a method will fully implement the decision of Brown and subsequent cases and the legislative declaration of § 2000d of the Civil Rights Act of 1964. Both decisional and statutory law positively and affirmatively call for school districts set up on a racially nondiscriminatory basis. The "freedom of choice" plan is treated in the Bradley dissent . . . as "only an interim measure, the adequacy of which is unknown." However, since this method could prove practical in achieving the goal of a nonsegregated school system, it should be allowed to demonstrate its efficacy to afford the constitutional guarantees which plaintiffs are entitled to as a matter of right. We, therefore, find that the "freedom of choice" plan is a permissible method at this stage.

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[78] *Stell* v. *Savannah-Chatham County Board of Education*, *supra* note 69; *Gaines* v. *Dougherty County Board of Education*, *supra* note 68.

[79] *Gaines* v. *Dougherty County Board of Education*, *supra* note 68; *Stell* v. *Chatham County Board of Education*, *supra* note 69; *Ross* v. *Dyer*, 312 F. 2d 191 (5th Cir. 1963).

[80] *Stell* v. *Savannah-Chatham County Board of Education*, *supra* note 69.

[81] *Supra* note 76.

[82] *Id.* at 440. *See also Kelley* v. *Board of Education of the City of Nashville*, 270 F. 2d 209, 230 (6th Cir. 1959), *cert. denied*, 361 U.S. 924 (1959).

[83] 352 F. 2d 14, 21 (8th Cir. 1965).

The court noted, however, that there was no provision in the plan determining the method of assignment where there was failure to exercise a choice. The court held that this situation had to "be remedied by an elimination of the existing dual attendance areas for children who fail to exercise a choice." [84]

The plan also provided for what is known as a "frozen choice." Students had a choice of schools only at the first grade of each level, elementary, junior high, and high school. Once a choice was made a student was locked into the chosen school until he reached the first grade of the next school level. The court held this to be insufficient: [85]

> If the child or his parent is to be given a meaningful choice, this choice must be afforded annually. The initiative for desegregation has been placed by the Board in the hands of the Negro parents and students [and] it is only fair that once a choice is made or had not been exercised, the child [must] not be precluded for long periods of time from changing schools.

In *Kier* v. *County School Board of Augusta County*,[86] the district court, relying on the *Bradley* decision in the Fourth Circuit, upheld a freedom of choice plan, stating: [87]

> In the absence of some overwhelming factual consideration such as, e.g., widespread hostility in the white community which might result in economic or other reprisals to a Negro parent who assumes the initiative in sending his child to a predominantly white school, I must follow the *Bradley* rationale.

The court also concluded that: "freedom of choice, fairly applied, is constitutionally sound in a rural area where its result may be less integration than under a geographic plan. . . ." [88]

In the *Kier* case, the court also held that a necessary precondition of an acceptable free choice plan was faculty desegregation, so that the image of "Negro" and "white" schools will be eliminated. Holding that the duty to desegregate faculty "must be immediately and squarely met, . . ." the court enjoined the school officials from continuing to maintain segregated faculties and administrative staffs by the 1966–67 school year. The court ruled that there could be no "freedom of choice" for faculty and staff assignments, stating that insofar as possible, "the percentage of Negro teachers in each school in the system should approximate the percentage of Negro teachers in the entire system for the 1965–66 school season." [89]

The requirement of faculty desegregation was recognized to have special significance when school assignments were made by the choice of the pupils. The court stated: [90]

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[84] *Ibid.*
[85] *Id.* at 22.
[86] Civil No. 65–c–5–H, W.D. Va., January 5, 1966.
[87] *Ibid.*
[88] *Ibid.*
[89] *Ibid.* See also *Dowell* v. *School Board of Oklahoma City Public Schools*, 244 F. Supp. 971, 977–78 (W.D. Okla. 1965).
[90] *Kier* v. *County School Board of Augusta County, supra* note 86.

Where, as here, the school authorities have chosen to adopt a freedom of choice plan which imposes upon the individual student, or his parent, the duty of choosing in the first instance the school which he will attend (and where the burden of desegregating is imposed upon the individual Negro student or his parents), it is essential that the ground rules of the plan be drawn with meticulous fairness. "The ideal to which a freedom of choice plan must ultimately aspire, as well as any other desegregation plan, is that school boards will operate 'schools,' not 'Negro schools' or 'white schools.' . . ." Freedom of choice, in other words, does not mean a choice between a clearly delineated "Negro school" (having an all-Negro faculty and staff) and a "white school" (with all-white faculty and staff). School authorities who have heretofore operated dual school systems for Negroes and whites must assume the duty of eliminating the effects of dualism before a freedom of choice plan can be superimposed upon the pre-existing situation and approved as a final plan of desegregation. It is not enough to open the previously all-white schools to Negro students who desire to go there while all-Negro schools continue to be maintained as such. Inevitably, Negro children will be encouraged to remain in "their school," built for Negroes and maintained for Negroes with all-Negro teachers and administrative personnel. . . . This encouragement may be subtle but it is nonetheless discriminatory. The duty rests with the School Board to overcome the discrimination of the past, and the long-established image of the "Negro school" can be overcome under freedom of choice only by the presence of an integrated faculty.

On November 15, 1965, the Supreme Court had remanded to a Federal district court for a full hearing on the issue of whether faculty segregation under a free choice plan was permissible.[91] The Supreme Court commented that "there is no merit to the suggestion that the relation between faculty allocation on an alleged racial basis and the adequacy of the desegregation plans is entirely speculative." [92]

[91] *Bradley* v. *School Board of the City of Richmond* 15 L ed 2d 187 (1965).
[92] *Id.* at 188.

III. THE STATEMENT OF POLICIES

A. Description of the Statement of Policies

Title VI of the Civil Rights Act of 1964 barred "discrimination" in programs and activities receiving Federal financial assistance. "Discrimination" was undefined. Title VI did not announce the rate or method by which the Department of Health, Education, and Welfare should require school boards to desegregate.[93] The Statement of Policies declares that:[94]

> **Title VI of the Civil Rights Act prohibits the extension of Federal financial assistance to any dual or segregated system of schools based on race, color, or national origin. To be eligible to receive, or to continue to receive such assistance, school officials must eliminate all practices characteristic of such dual or segregated school systems.**

The Statement of Policies supplies three methods by which a school district may eliminate "all practices characteristic of . . . dual or segregated school systems" and thus qualify for Federal financial assistance: (1) it may execute an assurance of compliance (HEW Form 441); (2) it may submit a final order of a court of the United States requiring desegregation of the school system, and agree to comply with the order and any modification of it; or (3) it may submit a plan for the desegregation of the school system which the Commissioner of Education determines is adequate to accomplish the purposes of the Civil Rights Act of 1964.[95]

1. Form 441

This standard assurance of nondiscrimination may not be executed if race remains a factor in pupil assignment, if faculty or other staff who serve pupils remain segregated on the basis of the race of the pupil, or if any activity, facility or other service, including transportation, provided or sponsored by a school system . . . is racially segregated.

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[93] Title IV of the Civil Rights Act of 1964, which grants authority to the Attorney General to initiate school desegregation lawsuits and to the Commissioner of Education to provide technical and financial assistance to aid "desegregation," defined that word in general terms as "the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin. . . ." In Title VI Congress specifically excluded from the definition of desegregation "the assignment of students to public schools in order to overcome racial imbalance," (42 U.S.C. 2000c(b) (1964).)

[94] U.S. Office of Education (Dept. H.E.W), "General Statement of Policies Under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools" I, April 1965 (hereinafter cited as "Statement of Policies").

[95] *Id.* at II.

Furthermore, a Form 441 may not be executed unless all practices characteristic of dual or segregated school systems have vanished.[96]

2. Court Orders

Desegregation resulting from a final order of a U.S. court is an acceptable method of qualifying for Federal aid. To be final, the order must "require the elimination of a dual or segregated system of schools based on race . . . ." The order must direct desegregation of the entire school system; it does not suffice if it merely directs school authorities to admit certain named persons.[97]

3. Desegregation Plans

Three types of voluntary desegregation plans are deemed adequate: plans providing for freedom of choice, plans creating geographic attendance areas, or a combination of both.[98]

All desegregation plans must satisfy certain requirements. The Statement of Policies declares that the race or color of pupils must not be a factor in the initial assignment of teachers, administrators, or other employees who serve pupils, and that "steps" must be taken toward the elimination of teacher and staff segregation resulting from prior racial assignments.[99]

Every plan must (1) provide for the elimination of racial discrimination with respect to services (including transportation), facilities, activities, and programs sponsored by or affiliated with the schools of the system; [100] (2) contain certain "specific information" as to actions that will be taken to prepare pupils, teachers, staff personnel, and the community for the changes incident to desegregation; [101] (3) provide that the plan will be published "in a conspicuous manner" in a newspaper having general circulation in the geographic area served by the school system, reasonably in advance of the time for any action which may be taken by pupils under the plan; [102] and (4) provide that pupils currently enrolled will be notified in advance of their rights under the plan, and that advance notices will be mailed to, or distributed "in any other manner that will assure their receipt by their parents or guardians." [103]

Where free choice plans are used, there must be adequate opportunity to make the choice annually. The choice must not be restricted by

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[96] *Id.* at III.
[97] *Id.* at IV.
[98] *Id.* at VA.
[99] *Id.* at VB(1)(a) and (b).
[100] *Id.* at VB(2).
[101] *Id.* at VB(3).
[102] *Id.* at VB(4)(a).
[103] *Id.* at VB(4)(b).

application of State pupil placement law criteria.[104] In the case of "initial assignment," that is, to the first grade at each school level, where overcrowding results at a particular school from choices made, preference must be given to those residing closest to the school or assignment must be made on the basis of nonracial attendance zones.[105] In the case of "initial assignment" to the lowest elementary grade level (including preschool and kindergarten), if no choice is made, pupils must be assigned to the school nearest their homes or on the basis of nonracial attendance zones.[106] In the case of "initial assignment" to the lowest grade of junior high and high school, pupils may either be required to make a choice of schools or be initially assigned, if they do not make a choice, to the school nearest their homes, or on the basis of nonracial attendance zones.[107] In all other grades covered by free choice, every pupil must have the right to transfer to a school of his choice.[108] If overcrowding results at a particular school from choices made, the pupil must "either be given preference over pupils residing farther from the school or . . . permitted to attend another school of his choosing within a reasonable distance of his residence." [109] If the transfer right is not exercised, the pupil may be required to remain at the school which he presently is attending.

With respect to the rate of desegregation, the Statement of Policies provides that every school system which submits a plan that fails to provide for the desegregation of every grade in all the schools in its system by the beginning of the school year 1965–66 must justify the delay and must include in its desegregation plan a time schedule for such desegregation.[110] The fall of 1967 is set as the "target date" for extension of desegregation to all grades of school systems not yet fully desegregated in 1965–66.[111] Every school system beginning desegregation must provide for "a substantial good faith start" on desegregation starting with the 1965–66 school year, in light of the 1967 target date. Such a good faith start normally must require provision in the plan that (1) desegregation will be extended to at least four grades for the 1965–66 school year, including the first and last high school grades, and the lowest grade of junior high where schools are so organized; [112] (2) students newly enrolled in the school system shall be assigned without regard to race; [113] (3) no pupil will be publicly supported in a

[104] *Id.* at VD (1) and (2).
[105] *Id.* at VD (3) (c), (4) (b).
[106] *Id.* at VD(3) (c).
[107] *Id.* at VD(4) (c).
[108] *Id.* at VD(5) (a) (1).
[109] *Id.* at VD(5) (b).
[110] *Id.* at VE(1).
[111] *Id.* at VE(2).
[112] *Id.* at VE(4) (a) (1).
[113] *Id.* at VE(4) (a) (2).

school outside the district unless such support is available without regard to race to all pupils residing in the school district;[114] (4) no student shall be required to attend a school outside the school district in order to maintain segregation or minimize desegregation in a school within the district;[115] (5) any pupil attending a school to which he originally was assigned on the basis of his race shall have the right, irrespective of whether the grade he is attending has been desegregated, to transfer to another school to take a course of study for which he is qualified and which is unavailable in the school he is attending;[116] (6) any student attending any grade, whether or not desegregated, at a school to which he originally was assigned on the basis of his race, shall have an opportunity, subject to the requirements and criteria applicable equally to all students without regard to race, to transfer to any other school in which he originally would have been entitled to enroll but for his race;[117] and (7) steps will be taken for the desegregation of faculty, at least including such actions as joint faculty meetings and joint inservice programs.[118]

In "exceptional cases" the Commissioner of Education may for "good cause" shown, accept plans which provide for desegregation of fewer or other grades or defer other provisions set out above for the 1965–66 school year, provided that desegregation for the 1965–66 school year shall extend to at least two grades, including the first grade.[119]

B. Judicial Decisions Subsequent to the Statement of Policies Relying Upon Office of Education Standards

Several decisions handed down subsequent to the Statement of Policies have adopted or heavily relied upon the standards established by the Office of Education. In *Singleton* v. *Jackson Municipal Separate School District*,[120] the Fifth Circuit said:

> We attach great weight to the standards established by the Office of Education. The judiciary has of course functions and duties distinct from those of the executive department, but in carrying out a national policy the three departments of government are united by a common objective. There should be a close correlation, therefore, between the judiciary's standards in enforcing the national policy requiring desegregation of public schools and the executive department's standards in administering this policy. Absent legal questions, the United States Office of Education is better qualified than the courts and is the more appro-

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[114] *Id.* at VE(4)(a)(3).
[115] *Ibid.*
[116] *Id.* at VE(4)(a)(4).
[117] *Id.* at VE(4)(a)(5).
[118] *Id.* at VE(4)(a)(6). This provision seems inconsistent with the previous assertion in the Statement of Policies that the race or color of pupils must not be a factor in "initial assignment" of teachers, administrators, or other employees who serve pupils. The timetable for desegregating faculties was left unclear by the Statement of Policies.
[119] *Id.* at VE(4)(b).
[120] 348 F. 2d 729, 731 (5th Cir. 1965).

priate federal body to weigh administrative difficulties inherent in school desegregation plans.

In a later decision the Fifth Circuit once again affirmed its intention to look to HEW for establishing minimal guidelines, stating that "'executive standards" were long "overdue" and again recognizing the inadequacy of the courts in dealing with school segregation: [121]

[T]his inescapably puts the Federal Judge in the middle of school administrative problems for which he was not equipped and tended to dilute local responsibility for the highly local governmental function of running a community's schools under law and in keeping with the Constitution.

In *Kemp* v. *Beasley*, the Eighth Circuit followed the same rationale: [122]

The Court agrees that these standards [HEW] must be heavily relied upon to determine what desegregation plans effectively eliminate discrimination.

The court said, however, that these standards are not binding on the courts because the "courts alone determine when the operation of a school system violates rights guaranteed by the Constitution." It stated: [123]

Therefore, to the end of promoting a degree of uniformity and discouraging reluctant school boards from reaping a benefit from their reluctance the courts should endeavor to model their standards after those promulgated by the executive. They are not bound, however, and when circumstances dictate. the courts may require something more, less or different from the H.E.W. guidelines.

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[121] *Price* v. *Denison Independent School District Board of Education*, 348 F. 2d 1010, 1013, 1014 (5th Cir. 1965).
[122] *Supra* note 83, at 18.
[123] *Id.* at 19.

IV. IMPLEMENTATION OF THE STATEMENT OF POLICIES

A. Staffing and Procedures of the Office of Education

In April 1965, the Office of Education was faced with the massive task of determining whether 4,941 school districts in the Southern and border States, each unique, were in compliance with the standards adopted by that office to implement Title VI.[124] By the policies which it had established, the Office of Education was required to evaluate assurances of compliance, judge the acceptability of desegregation plans and court orders, and determine whether each district was faithfully keeping its promises. In addition, the Office of Education had the major task of persuading school officials to comply with the standards it had adopted; the object was to secure compliance wherever possible, not to terminate funds needed for the education of children. The staff of the Office of Education's newly established Equal Educational Opportunities Program (EEOP), working long hours, made repeated overtures to resistant school officials, by telephone and in person.[125] As a result of these negotiations, by January 3, 1966, 98 percent of the 4,941 school districts were deemed qualified by the Office of Education.[126] Included in this total were many Southern communities where the prospect of school desegregation—even to the extent of announcing it as a policy—had seemed remote a short time before. In short, many areas of the South shifted their posture from resistance of Federal law to at least agreement to comply.

There is ground for questioning, however, whether this compliance on paper has been accompanied by compliance in fact. The Office of Education had a professional staff, which eventually approximated 75, to evaluate assurances of compliance, desegregation plans and court orders, to negotiate with school officials, and to conduct investigations to determine whether assurances, plans, and court orders were being

[124] Office of Education, "Boxscore," Jan. 3, 1966.

[125] On August 23 the President instructed the Secretary of Health, Education, and Welfare, John W. Gardner, to have the Office of Education "work around the clock" processing 930 pending desegregation plans. White House Press Secretary Bill Moyers said that President Johnson also "instructed Dr. Gardner to send telegrams to school districts that have yet to submit a plan, reminding them that if they expect Federal assistance this fall they will have to submit and have approved a plan." (SERS, "Compilation," Aug. 1965, Wash. 1).

[126] Office of Education, "Boxscore," Jan. 3, 1966.

followed.[127] The available staff, while sufficient to handle the paper work, was insufficient to undertake the field investigations necessary to evaluate properly the assurances, plans, and court orders and to determine whether school districts were following them. Instead, model freedom of choice and geographic zone plans, with sets of alternative provisions, were distributed and it became possible to qualify by selecting those sections that were applicable to the particular school district.[128] Final court orders were accepted without a field investigation to determine whether the school districts involved were in compliance with the orders.[129] Form 441 assurances of compliance were accepted if the Office of Education had evidence that all of the children in the school district were of one race, or if State officials or some other credible source asserted that full desegregation had been consummated. These reports rarely were verified by personal inspection.[130]

On January 11, 1966, the Equal Educational Opportunities Program was reorganized. Under the reorganization plan, the country was divided into five geographical areas, each with a coordinator to administer Title VI and the provisions of Title IV of the Civil Rights Act of 1964 providing technical and financial assistance to enable school districts to deal effectively with the problems incident to desegregation. A staff of 105 persons has been authorized, approximately 45–50 of whom will be professionals available for travel and investigation.[131]

B. Statistical Results

As of January 3, 1966, the Office of Education had accepted 2,755 Form 441 assurances of compliance, 164 court orders and 1,904 desegregation plans from the 17 Southern and border States.[132] A total of 4,823 districts had been certified as qualified to receive Federal financial assistance—98 percent of all the districts in the 17-State region.[133]

According to the Office of Education, in the 1965–66 school year, 1,563 school districts were "newly desegregating," that is, had adopted a policy of desegregation for the first time.[134] This number exceeds by 87 the total number of districts newly desegregating during the entire period commencing shortly before the *Brown* decision in 1954 and

[127] Discussion with David S. Seeley, Director, EEOP. Many persons were borrowed temporarily from the Department of Justice and from other sections of the Office of Education and the Department of Health, Education, and Welfare. Several persons were hired for the summer, including some law students. *Ibid.*

[128] *Ibid.* Under the model freedom of choice plans, the parent of each student was required to make a choice. Of the approximately 1,500 freedom-of-choice plans accepted by the Office of Education, approximately 1,200–1,300 made the choice mandatory. Discussions with EEOP officials.

[129] *Ibid.*

[130] *Ibid.*

[131] *Ibid.*

[132] Office of Education, "Boxscore," Jan. 3, 1966.

[133] *Ibid.*

[134] *Ibid.*

ending with the beginning of the 1965–66 school year.[135] Each of the 17 Southern and border States contain newly desegregated districts in As of January 3, 1966, there were 92 newly desegregated districts in Alabama, 193 in Arkansas, 17 in Delaware, 48 in Florida, 174 in Georgia, 38 in Kentucky, 5 in Louisiana, 5 in Maryland, 96 in Mississippi, 10 in Missouri, 112 in North Carolina, 57 in Oklahoma, 81 in South Carolina, 89 in Tennessee, 482 in Texas, 62 in Virginia, and 2 in West Virginia.[136]

In several Deep South communities desegregating for the first time in 1965–66, relatively sizable numbers of Negro students attended school with white students. For example, the Southern Education Reporting Service states that as of December 1965, 158 of the 4,034 Negro students in Fairfield, S.C., and 104 of the 4,000 Negro students in Kershaw County, S.C., were attending school with white students.[137] According to estimates made by the Student Nonviolent Coordinating Committee, 130 of the 1,402 Negro students in Florence, Ala.,[138] 110 of the 279 Negro students in Benton, Ark.,[139] and 146 of the 5,822 Negro students in Greenville, Miss.,[140] were attending school with white students in September 1965. All of these districts were desegregating for the first time in 1965–66 under a freedom of choice plan. Even such communities as Selma, Ala., Neshoba County, Miss., and Terrell County, Ga., which have a history of past racial violence, adopted plans of desegregation which were accepted by the Office of Education.[141]

Of the 1,904 approved plans of desegregation submitted by school districts in the Southern and border States, 79 percent provide for coverage of all grades in the school system for the 1965–66 school year. The grades not now covered under the plans of the remaining school districts will be desegregated, according to the plans, in the 1966–67 or the 1967–68 school year.[142]

Nevertheless, judging by the available information, the percentage of students in the Deep South attending school with white children is low. The Office of Education, based on a sampling of 590 districts through a telephone survey conducted in cooperation with State departments of education, estimates that 216,000, or 7.5 percent, of the

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[135] Southern Education Reporting Service (SERS), Statistical Summary 29, Dec. 1965. The Southern Education Reporting Service is an impartial, factfinding agency directed by a board of Southern newspaper editors and educators under grant from the Ford Foundation. Statistics are compiled by journalists who serve as State correspondents.

[136] Office of Education, "Boxscore," Jan. 3, 1966.

[137] *Supra* note 135, at 18. The enrollment figures are estimates made by EEOP.

[138] Student Nonviolent Coordinating Committee (SNCC), "Special Report on School Desegregation," Table I, Sept. 30, 1965. Enrollment figures are estimates of EEOP.

[139] *Id.* Table II.

[140] Id. Table V.

[141] EEOP, "Court Orders and Voluntary Desegregation Plans for Public School Systems," Cumulative List No. CV–6, Dec. 1, 1965.

[142] Office of Education, "Boxscore," Jan. 3, 1966.

Negro students in the 11 Deep South States are enrolled in school this year with white pupils.[143] Civil rights organizations, relying upon figures obtained from a variety of sources, including field workers, advance a lower figure. The Southern Regional Council's estimate is 151,416 Negro pupils, or 5.23 percent of the total.[144] The American Friends Service Committee and NAACP Legal Defense and Educational Fund agree that the actual figure is less than 6 percent.[145] The estimate of the Southern Educational Reporting Service of Nashville, Tenn., is 182,767, or 6.01 percent.[146] Although (depending upon whose estimates are correct) the number of Negroes attending school with whites in the Deep South has doubled or tripled since the 1964–65 school year, the number is still very low.

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[143] Office of Education, telephone survey, Table I, Sept. 27, 1965.

[144] Southern Regional Council, "School Desegregation: Old Problems Under a New Law" 9, Sept. 1965.

[145] American Friends Service Committee and NAACP Legal Defense and Educational Fund, "Report on the Implementation of Title VI of the Civil Rights Act of 1964 in Regard to School Desegregation" 4, Nov. 15, 1965.

[146] *Supra* note 135, at 2. Its estimate for all of the Southern and Border States is 567,789, or 15.89 percent.

V. DESEGREGATION UNDER THE STATEMENT OF POLICIES

A. Commission Investigations

The central legal and policy issues in Southern school desegregation concern the permissible methods by which local school boards may assign students to schools so as to eradicate the effects of 100 years or more of dual and racially segregated school systems. About 57 percent of all the desegregation plans approved by the Office of Education have employed the freedom of choice method exclusively while only 12 percent of the districts have used geographic zoning.[147] Most of the remaining plans also utilize freedom of choice, although not as the sole device to desegregate.[148] Accordingly, the principal focus of the Commission has been on school districts submitting approved free choice plans. The Commission also has studied districts operating under approved court orders and districts operating under approved Form 441 assurances of compliance.

Beginning shortly after the opening of school in the fall of 1965 and continuing into mid-November, Commission staff attorneys visited school districts in Alabama,[149] Mississippi,[150] Georgia,[151] Virginia,[152] Florida,[153] Kentucky,[154] and Missouri.[155] These attorneys interviewed school district superintendents, school board members, white and Negro principals and teachers, white and Negro community leaders, newspaper editors and publishers, sheriffs and police, scores of Negro parents, and scores of Negro students.

By its selection of districts, the Commission attempted to obtain a representative cross section. Care was taken to examine both the Southern and border States, urban and rural areas, districts in which Negroes formed the majority of the student body and districts in which they constituted a minority, districts desegregating for the first time in the 1965–66 school year and districts in which desegregation

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[147] Office of Education, "Boxscore," Jan. 3, 1966.
[148] *Ibid.*
[149] Anniston.
[150] Webster and Calhoun counties.
[151] Americus and Sumter County.
[152] Charlottesville.
[153] Bay County.
[154] Lexington and Fayette County.
[155] Eight independent districts in Pemiscot County and one school district in Dunklin County.

had been underway for several years, districts desegregating under approved plans and those desegregating under court orders, and districts where desegregation reportedly was encountering trouble and those where it allegedly was working well.

In addition, members of the Commission's State Advisory Committees in Alabama, Arkansas, Delaware, Florida, Georgia, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia surveyed 27 communities in those States to determine the progress of desegregation. The Commission also had the assistance and cooperation of the Commissioner of Education and his staff of the Equal Educational Opportunities Program and the Civil Rights Division of the Department of Justice. The results of investigations conducted by the Department of Justice and the Office of Education have been made available to the Commission. Desegregation information compiled by the Southern Education Reporting Service covering hundreds of school districts has been reported monthly to the Commission by contractual arrangement. And members of the Commission's staff have conferred with representatives of a number of private and public organizations actively concerned with school desegregation.

B. Freedom of Choice Plans in Operation

The vast majority of plans submitted by school authorities in Deep South States have been freedom of choice plans. All of the five plans accepted by the Office of Education from Louisiana employ the freedom of choice method exclusively. In Mississippi the comparable figure is 98 of 100 (98 percent), in South Carolina 85 of 88 (96.5 percent), in Alabama 87 of 93 (93.5 percent), and in Georgia 164 of 179 (91.6 percent).[156]

1. Extent of Integration

According to estimates made by Southern Education Reporting Service in December 1965, the number of Negroes attending school with white students in these States was as follows:[157]

Negroes in school with white students

	Number	*Percent*
Alabama	1,250	.43
Mississippi	1,750	.59
Louisiana	2,187	.69
South Carolina	3,864	1.46
Georgia	9,465	2.66

[156] Office of Education, "Boxscore," Jan. 3, 1966.
[157] *Supra* note 135, at 2.

There are approximately 102 school districts that have qualified under Office of Education standards where no Negroes are attending school with white children. In Alabama there are 3; Arkansas 9; Florida 16; Georgia 27; Louisiana 13; Mississippi 24; and South Carolina 5. Most are operating under approved free choice plans.[158] Commission staff visited two of these counties—Webster County, Miss. (866 Negro students in the school population), and Sumter County, Ga. (1,943 Negro students in the school population)—which continue to receive Federal funds although no integration has occurred under the approved freedom of choice plan.[159] In August and September 1965, the Southern Education Reporting Service indicated that no integration had occurred under Office of Education approved free choice plans in other school districts containing hundreds and even thousands of Negro students, such as Chambers County, Ala. (3,610 Negro students); Fayette County, Ala. (837 Negro students); Cherokee County, Ala. (520 Negro students); McNeil, Ark. (340 Negro students); Carthage, Ark. (200 Negro students); Washington, Ark. (440 Negro students); Brooks County, Ga. (2,376 Negro students); and Pontotoc County, Miss. (750 Negro students).[160] In Berrien County, Ga., 32 Negro students applied for transfer and 30 were approved, but, according to the superintendent, all changed their minds before enrolling.[161]

Staff attorneys visited several school districts operating under approved free choice plans in which conditions apparently were favorable to desegregation, including districts in Southern States where school authorities and community leaders encouraged peaceful acceptance of desegregation, in border States where desegregation had been in effect for years, and in States where white schools were as easily accessible to Negroes as Negro schools. In these districts only a small percentage of the Negro students covered by free choice are attending school with white children *during the 1965–66 school year.*

Anniston, Ala., visited by staff attorneys October 5–8, 1965, experienced its first school desegregation in September 1965.[162] Steps previ-

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[158] Information supplied by the Department of Justice.

[159] Interviews by staff attorneys with Mr. F. E. Lucius, Supt. of Schools, Webster County, Miss., Oct. 1965 and Mr. Ed. N. Bailey, Supt. of Schools, Sumter County, Ga., Nov. 1965.

[160] SERS, "Compilation," Sept. 1965, Ala. 7; Ark. 4, 5, 8; *Id.* Aug. 1965, Ga. 3; Miss. 3. Some of the Negro enrollments are estimates made by the Office of Education based on the 1964–65 school year.

[161] SERS, "Compilation," Aug. 1965, Ga. 3. In addition, the Student Nonviolent Coordinating Committee asserts that as of September 1965, the following school systems, among others, operating under freedom of choice plans had no Negro students attending schools with white students: Houston County, Ala. (Negro enrollment 1,760); Lee County, Ala. (2,114); Jones County Ga. (1,426); Crawford County, Ga. (1,079); Cook County, Ga. (1,155); Hawkinsville, Ga. (1,489); Scott County, Miss. (1,959); East Jasper, Miss. (2,041); Attala County, Miss. (1,551); Simpson County, Miss. (2,410); and Lafayette County, Miss. (2,649). SNCC, *supra* note 138, at 23.

[162] Interview by staff attorneys with Dr. T. Revis Hall, Supt. of Schools, Anniston, Ala., Oct. 1965. In the summer of 1965, 20 Negro students attended two formerly all-white schools. *Ibid.*

ously taken had afforded a basis for believing that substantial desegregation would occur. The Board of Education had agreed in the summer of 1964, and had secured the agreement of leaders of the local Negro community, to desegregate the schools in September 1965.[163] In the interval the Board had worked to secure an orderly and peaceful climate conducive to desegregation.[164] The superintendent had met with principals and parent-teachers associations.[165] The Anniston newspaper had publicized and supported the plan.[166] The official biracial Human Relations Council had urged community acceptance.[167] Negro civil rights groups had actively encouraged desegregation.[168] The mayor and influential businessmen did likewise.[169] The Anniston plan of desegregation covers all 12 grades. But of the 3,213 Negroes enrolled this school year, only 68 (2.1 percent) are attending schools with white children.[170]

Lexington, Ky. (the home of the University of Kentucky, Transylvania College and the College of the Bible), was visited by staff attorneys November 2–6, 1965. Lexington has relatively good race relations. A Negro has been elected to the city council and a Negro serves on the school board.[171] The Lexington Commission on Human Rights, an official city agency, is chaired by a Negro.[172] There are 10,029 students in the Lexington public schools this school year, 40 percent of whom (3,982) are Negroes.[173]

Desegregation began in Lexington in 1955 under a "free choice" plan.[174] Although Lexington had been desegregating for 10 years, only 294 Negro children—8 percent—attended desegregated schools during the 1964–65 school year.[175] In 1965, Lexington changed its desegregation plan. All 13 elementary schools were zoned geographically while secondary schools remained on freedom of choice.[176] The number of elementary school Negroes attending school with white chil-

[163] Interview by staff attorneys with Rev. N. Quintus Reynolds, president of the Calhoun County Improvement Association, Nov. 1965.
[164] Interview by staff attorneys with Dr. T. Revis Hall, *supra* note 162.
[165] *Ibid.*
[166] Interview by staff attorneys with Mr. H. Brandt Ayers, managing editor of the Anniston Star, Nov. 1965.
[167] Interview by staff attorneys with Mr. Claude F. Dear, Jr., Mayor of Anniston, Nov. 1965.
[168] Interview by staff attorneys with Rev. N. Quintus Reynolds, *supra* note 163.
[169] Interview by staff attorneys with Mr. Claude F. Dear, Jr., *supra* note 167.
[170] Interview by staff attorneys with Dr. T. Revis Hall, *supra* note 162.
[171] Interviews by staff attorneys with Dr. Abby Mariatt, faculty member of the University of Kentucky and member of Congress on Racial Equality (CORE), and Miss Julia Lewis, social worker and member of CORE, Nov. 1965.
[172] *Ibid.*
[173] Lexington public schools, "Statistical Report to the Superintendent," First Month, 1965–66.
[174] Interview by staff attorneys with Mr. J. M. Deacon, Assistant Supt. of Schools, Lexington, Ky., Nov. 1965.
[175] Lexington public schools, "Pupil Membership," June 4, 1965.
[176] Plan of Desegregation for the Lexington Public Schools approved by the Office of Education, June 15, 1965.

dren rose from 196 (8 percent) to 2,115 (85 percent), although 1,246 Negro children were attending schools one of which was 99 percent and another 82 percent Negro. Even though the percentage of Negroes attending desegregated secondary schools also increased, 80 percent still attend all-Negro schools.[177]

One of eight school districts in Pemiscot County, in the "boot heel" of Missouri, is South Pemiscot School District R–5. It contains two campuses of three schools each. On each campus two of the three schools were reserved for white and the third for Negro students prior to the 1965–66 school year. Free choice this school year has been accorded to grades 1–8, with all senior high school children attending class together. Only 6 percent of the 493 Negro students in grades 1–8 chose integration, even though it is as convenient for Negroes to attend the integrated school as the all-Negro school.[178]

Similarly, in many districts in Maryland desegregating under approved free choice plans, the percentage of Negroes choosing white schools in the 1965–66 school year was low—in Queen Anne's 40 of 1,340, in Somerset 77 of 2,095, in Talbot 149 of 1,499 and in Charles 635 of 4,273.[179]

2. Factors Retarding Integration Under Free Choice Plans

Negroes in the South have occupied for decades a subservient status to which many are strongly conditioned. It is difficult for many of these Negroes to exercise the initiative required of them by free choice plans. In many cases the long history of subservience has eroded the motivation they might otherwise have to alter their way of life. In addition, there are other factors identified by the Commission which have retarded integration under free choice plans.

a. Continued Racial Identity of Schools

Under freedom of choice plans, schools tend to retain their racial identification. Such plans require affirmative action by parents and pupils to disestablish the existing system of dual schools. Thus, in Hayti, Mo., where the school district operates under an Office of Education approved free choice plan, all students and regular faculty members at Central High School are Negro.[180] A plaque in the lobby by the entrance of Central High School reads "1932—Hayti Negro School." It is rare for a white pupil to choose voluntarily to attend an identifiably "Negro" school. In only one of the districts visited

[177] Lexington Public Schools, *supra* note 173.
[178] Interview by staff attorney with Mr. Riley F. Knight, Supt. of Schools, Nov. 1965.
[179] SERS, *supra* note 135, at 12.
[180] Plan of Desegregation for Hayti Reorganized School District R–II. Hayti, Mo., approved by the Office of Education, Aug. 31, 1965.

by Commission attorneys (Lexington, Ky.) did a white child choose a Negro school, and that school subsequently became fully segregated when the child moved out of the State three months later.[181] Racial identification of schools strengthens and is perpetuated by normal school ties, which render students reluctant to leave the schools which they presently attend. This is true of Negro students as well as white students. The Lexington, Ky., school superintendent pointed out that there is a strong attachment to the Negro high school by the Negro community even though the Negro high school has known inadequacies.[182] He said that the all-Negro Dunbar School has won or been runner-up in the State basketball tournament several times; that in 1965–66 a senior girl at Dunbar was a national merit scholarship finalist, and that several Dunbar students have won State debating and other scholastic awards in integrated competitions. Such achievements, he suggested, tend to increase the Negro student's identification with his school.[183]

A Negro school board member in Charlottesville, Va., told staff attorneys that Negro students could transfer from all-Negro Burley High School to formerly white Lane High School but that many were primarily interested in the Burley football team and band, both of which had won honors.[184] A Negro student in Americus, Ga., told staff attorneys that he did not choose a white school because he wanted to play football for the Negro school and graduate with his friends. A Negro girl in Calhoun County, Miss., also told staff investigators that she did not choose a white school because she wanted to graduate with her class at the Negro school.

Negro school administrators and teachers frequently have an interest in maintaining the dual school system. A report of a task force study financed jointly by the National Education Association and the Office of Education—issued in December 1965—stated: [185]

> . . . when Negro pupils in any number transfer out of Negro schools, Negro teachers become surplus and lose their jobs. It matters not whether they are as well qualified as, or even better qualified than other teachers in the school system who are retained. Nor does it matter whether they have more seniority. They were never employed as teachers for the school system—as the law would maintain—but rather as teachers for Negro schools.

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[181] Telephone interview with the assistant principal of Dunbar High School, Jan. 1966.

[182] Interview by staff attorneys with Mr. Conrad Ott, Supt. of Schools, Lexington, Nov. 1965. See also interview with Mrs. John Madison, President of Dunbar PTA, Nov. 1965.

[183] *Ibid.*

[184] Interview by staff attorneys with Mr. Raymond Lee Bell, member of the Charlottesville, Va., School Board, Oct. 1965.

[185] "Report of Task Force Appointed To Study the Problem of Displaced School Personnel Related to School Desegregation and the Employment Status of Recently Prepared Negro College Graduates Certified To Teach in Seventeen States" 13, December 1965.

The task force found that from May 1965 to September 1965, at least 668 Negro teachers were displaced by desegregation.[186]

Some Negro educators are opposed to desegregation wholly apart from any fear that they will lose their employment. One Mississippi Negro principal interviewed by a Commisison investigator reasoned that Negro youngsters should be realistic about their employment opportunities, and that Negro high schools that emphasize trades are more suitable than white high schools. He also stated that because of economic and cultural deprivation many Negro children enter school much less prepared for education than white children. Until this gap is repaired, he thought, dual schools would be advantageous. The attitudes of such educators are relevant because they frequently are among the most respected members of the Negro community and their opinions influence the choices made by Negro parents and children.

b. Fear, Intimidation, and Harassment

A substantial factor in the reluctance of Negro parents and children to select "white" schools is fear. Many Negro parents in Webster and Calhoun counties, Miss., in Americus and Sumter County, Ga., and in Anniston, Ala., expressed such fear. In Anniston, the Negro parents were unable to cite any specific instance of intimidation, but referred to television and newspaper accounts of trouble in connection with school desegregation elsewhere.[187] Frequently, however, the fear is based upon actual instances of harassment and intimidation of Negro parents and pupils.

For example, in Webster County, Miss., where Negroes constitute 28 percent of the student population, school desegregation began in 1965 under a plan providing free choice for all students in grades 1, 7, 10, and 12 only.[188] The plan was published on July 22, 1965.[189] A local newspaper editor told a staff attorney that on or about July 1, 1965, a cross was burned in the front yard of the sheriff of Webster County and that a few weeks later near midnight crosses were fired at the county courthouse and on highways near three county towns. Negroes told staff attorneys in October 1965 that Ku Klux Klan literature had appeared in their mailboxes or on the front steps of their houses for several months. A former Negro school teacher reported that on August 12, near midnight, about 60 shots had been fired into his home. Staff attorneys personally viewed the bullet holes. About a mile from this house staff attorneys saw a sign announcing a Klan rally on August 27, the day school registration had been scheduled.[190]

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[186] *Id.* at 56.
[187] U.S. Commission on Civil Rights, "Field Investigation Report on Anniston, Ala.," Nov. 1965.
[188] Plan of Desegregation for Webster County, Miss., approved by the Office of Education, July 26, 1965.
[189] Interview by staff attorneys with Mr. F. E. Lucius, *supra* note 159.
[190] *Ibid.*

The Negro school teacher stated he had read in a newspaper that the rally had been well attended.

Staff investigators talked to 16 Negro families in Webster County. These families were aware that the white community did not want desegregation; feared for their safety and that of their children; believed freedom of choice would only work if there were Federal protection and if a sufficient number of Negroes were involved; and doubted that any Negroes would choose a white school next year.

Two Negro families in Webster County told staff attorneys they had selected formerly all-white schools for three children scheduled to enter the first grade in September 1965. In each instance, it was related, within hours after the form had arrived at the office of the superintendent, the families were visited by a white citizen of the county who wondered whether a "mistake" could not have been made. Both families stated that as a result of these visits they altered their "choice" and selected a Negro school. Nevertheless, they assert, within a short time they were told by their white landlords to move out of their houses. Thus, a Negro parent related to staff attorneys how he decided not to send two eligible children to the white school because he feared eviction from his farm. He also said that he had heard a county law enforcement official say that Negroes had better not attend white schools.

Sumter County, Ga., this year has been operating four all-Negro schools that serve 1,943 pupils, 66 percent of the county enrollment.[191] Four all-white schools complete the system.[192] Under the Sumter County desegregation plan approved by the Office of Education, all 12 grades were to be desegregated.[193] All of the Negro children who had designated white schools on their freedom of choice forms changed their choice. Some of the Negro parents who had chosen white schools said to staff attorneys that they had received threats of physical violence to themselves or their children. The father of one Negro student stated that within 48 hours of submitting the choice form designating a white school he was told by his employer, who also was his landlord, that he would lose his job and home if his child attended the white school. The mother of a Negro student who selected a white school was fired from her job as a maid within 24 hours after submission of the choice form.[194] Other Negro parents electing white schools for their children said that they were threatened with loss of employment. Sumter County Negro families are vulnerable to economic pressure. According to a survey of students by school authorities conducted on

[191] Interview by staff attorneys with Mr. Ed N. Baily, *supra* note 159.
[192] *Ibid.*
[193] Plan of Desegregation for Sumter County, Ga., approved by the Office of Education on Sept. 20, 1965.
[194] Interview by staff attorneys with Mr. Ed N. Baily, *supra* note 159; corroborated by independent investigation.

October 28, 1965, 73 percent of the Negro pupils were from families with incomes of less than $2,000 per year.

Americus, Ga., which is located in Sumter County but has a separate school system, first desegregated in 1964 when the school board accepted the applications of four Negro children to attend Americus High School.[195] Life was not the same thereafter for these children or their families. One of the families reported to staff attorneys that after they had elected the white school for their daughter their house had been attacked repeatedly. The attorneys viewed a hole through the front picture window. The father said the hole had been put there in August 1965. According to the chief of police, a marble had been shot through the window.[196] Members of the family said that bottles, stones, toilet paper, and paint had been thrown at the house and that there had been many threatening and obscene phone calls. The girl student—then aged 15—was convicted of a morals charge before the school year ended. The girl's father, an Americus school teacher for 19 years, feared he would be fired. Notwithstanding these facts, the girl returned to Americus High School in 1965 and was joined by her 14-year-old brother.

The family of another of the four students to desegregate Americus last year informed staff attorneys that they have lived in armed vigil for more than a year. Guns were observed in nearly every room of their modest house by a staff attorney. The mother said that the house has been assaulted frequently by bricks, bottles, and rocks thrown from passing cars. She stated that five or six attacks had been reported to the police, and that the reports had specified the license tag numbers of the cars. Although the chief of police confirmed that rocks had been thrown at the house, he said that no arrests have been made. He blames the race troubles of Americus on "outside agitators." [197]

Instances of intimidation have occurred in other counties. The family of one seventh grade Negro girl, who had selected a white school in Calhoun County, Miss., was threatened by the Klan after registration but before school began and was afraid to enroll. When Commission staff talked to her she had not attended any school for six weeks since the school board insisted she attend the school of her choice or no school.[198] The superintendent also received a note from the Klan.[199] No arrests have been made.[200] According to the Southern Education

[195] Plan of Desegregation for Americus, Ga., approved by the Office of Education on Aug. 25, 1965.
[196] Interview with Mr. Ross Chambliss, Chief of Police, Americus, Ga., Nov. 1965.
[197] *Ibid.*
[198] Interview by staff attorneys with Mr. J. E. Cook, Supt. of Schools, Calhoun County, Miss., Oct. 1965.
[199] *Ibid.*
[200] Interview by staff attorneys with Mr. Vincent Bryant, Sheriff of Calhoun County, Miss., Oct. 1965.

Reporting Service, in Madison County, Miss., a Negro woman was told to vacate her home or withdraw her child from an integrated school,[201] and the parent of a Negro child who had entered a white school in Scott County, Miss., had a gun duel with some white men attempting to burn a cross at his house.[202]

Civil rights organizations assert that there has been intimidation elsewhere as well.[203] The American Friends Service Committee and the NAACP Legal Defense and Educational Fund have alleged that "threats and acts of intimidation, economic reprisal and violence occurred throughout the South—sometimes to terrorize Negroes before the registration period; sometimes to discourage the Negroes who had become identified when they registered their children; sometimes to force the withdrawal of Negro pupils after schools had been desegregated." The report alleges evictions, a beating, and a shooting in Georgia and states that several persons lost their jobs in a Georgia county after enrolling their children in desegregated schools.[204]

Similarly, the Southern Regional Council claims that "crossburnings, shootings into Negro homes, and other acts of intimidation were used to force withdrawal of Negro students from some systems."[205] Other asserted instances of intimidation are also cited by these groups.

The Department of Justice has investigated at least 80 alleged incidents of intimidation and harassment of Negro families and students in eight States in connection with desegregation for the 1965 school year. Thirty of the investigations were conducted in Mississippi, 14 in South Carolina, 11 in Georgia, 7 in North Carolina, 6 in Alabama, 5 in Tennessee, 4 in Arkansas, and 3 in Louisiana. The investigations in Mississippi included investigations of alleged shootings, job firings, evictions, cross burnings, assaults, church and barn burnings, threatening phone calls, and harassment of Negro parents and students. Other investigations involved reports that school officials had attempted to dissuade Negro parents from choosing white schools for their children, or visited Negro families to inform them that their children would not be protected at school.[206]

On January 11, 1966, the Department of Justice filed lawsuits against three school districts which have qualified under Title VI by submitting

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[201] SERS, "Compilation," Sept. 1965, Miss. 4.

[202] *Ibid.*

[203] These allegations have not been verified by the Commission. The allegations, and other allegations cited from reports of private organizations, are not intended to show the truth of the facts charged, but only to indicate that the charges have been made.

[204] *Supra* note 145, at 26. Other reports on school desegregation in the 1965–66 school year have been filed with the Office of Education by the Student Nonviolent Coordinating Committee, the Southern Regional Council, the Georgia Council on Human Relations, and the Alabama Council on Human Relations. Each of these reports contain allegations of Title VI violations.

16, Sept. 1965.

[205] Southern Regional Council, "School Desegregation: Old Problems Under a New Law" 16, Sept. 1965.

[206] Information compiled by the Department of Justice.

accepted desegregation plans and therefore continue to receive Federal financial assistance. The Office of Education had reported that these districts had "compliance problems".[207] One case involves a district operating under a four grade (1, 2, 9, and 12) freedom of choice plan approved for Franklin County, N.C. The complaint alleges that after 31 free choice applications and 30 applications for "lateral transfers" in grades not yet covered had been filed by Negroes with the Board of Education, the Board had the names and addresses of these 61 Negroes published in a local newspaper. After this publication, the complaint asserts, the students and their families were "threatened and intimidated by various means, including cross burnings and the shooting of firearms at homes of Negroes. . . ." The complaint alleges that 20 of the 31 children withdrew their choices and are enrolled in all-Negro schools.

The deterrent effect of such intimidation is reflected in fear of retaliation, expressed by Negroes in several areas, including Jackson, Miss.; Tupelo, Miss.; Mobile, Ala.; Williamsburg County, S.C.; Salisbury, N.C.; Talbot County, Md.; Charles County, Md.; and Somerset County, Md.[208]

Harassment of Negro students who attend formerly white schools is another deterrent. In Americus, Ga., where 50 percent of the students are Negroes, a 12-grade freedom-of-choice plan is in effect.[209] Ninety Negro pupils chose "white" schools at spring registration in May 1965. All requests were granted but when school opened at the end of August, only 40 of the original 90 Negroes entered such schools.[210] At the time of the Commission's staff investigation in November, only 26 remained.[211] Staff attorneys interviewed eight of the students who had transferred back to all-Negro schools. One student declared he could not study because buckshot, books, and BB-gun pellets had been thrown at him by white students and he had received threatening telephone calls at home. Another Negro boy related that he had been subjected to similar treatment and had been suspended for three days when a fight developed after a white boy had called him "nigger".

Of the 26 Negroes still enrolled in integrated schools, 12, and the families of 4 others, were interviewed by Commission staff. Information disclosed in these interviews indicates that a pattern of harassment and violence in the secondary schools had developed, accompanied by a lack of supervision and enforcement of discipline by

[207] Discussion with EEOP officials.
[208] State advisory committees (U.S. Commission on Civil Rights), "School Survey," Sept. 1965.
[209] Plan of Desegregation for Americus, Ga., *supra* note 195.
[210] Interview by staff attorneys with Mr. W. C. Mundy, Supt. of Schools, Nov. 1965. Many students remained at the Negro school when a football team, band, cheerleaders, and a glee club and honor societies were introduced for the first time. *Ibid.*
[211] *Ibid.*

high school officials. It was alleged that white students had struck Negro students with their fists and had thrown rocks and books at them. It was stated that Negro students had been called derogatory names, had had their books thrown on the floor and knocked from their hands, and had been tripped, spat upon, and nearly run down by cars in the parking lot. Many of the persons interviewed reported that spitballs had been aimed at Negro students in class. One Negro boy stated that he had been the repeated target of a missile consisting of two long needles, bound to wooden pegs and propelled by a rubber band, and that one such weapon had lodged in his clothing. A Negro girl asserted that she had been pushed down a flight of stairs and later hit on the head by a rock.

These Negro students complained of this treatment but felt that little or nothing had been done to prevent it or punish those responsible. One staff attorney in Americus talked to two Negro girls who had been involved that afternoon in a fight at Americus High School. They said that while attempting to enter the school their path had been blocked by a group of 20–30 white boys and that when they had attempted to walk around the boys, each had been kicked by a boy. The girls said that when one of the girls had turned around, a third boy had kicked her, whereupon a fight had ensued in which the girl had been thrown to the ground and bruised and the boy's shirt had been torn. The superintendent suspended both girls and the third boy for three days each. The superintendent admitted he took this disciplinary action without having interviewed the girls. He stated he had talked to some of the white boys whose story was that they had been attacked by the girls. The superintendent did not believe he had been unfair or that the boys' story was implausible.[212]

In Calhoun County, Miss., which borders Webster County, the school board operates six schools in three towns, each town containing a white school and a Negro school.[213] Under a plan accepted by the Office of Education, Negroes in grades 1, 7, 10, and 12 have free choice privileges this year.[214] Twenty-three Negro students elected white schools but only six entered such schools in the fall.[215] When Commission staff visited the school district in October, only three were enrolled.[216] One of those who had dropped out told staff attorneys she had done so because of student abuse and fear of retaliation against her family. The other two Negro students claimed they had mistakenly selected a white school.

Investigators talked to the three Negro students still enrolled.

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[212] Interview by staff attorneys with Mr. C. W. Mundy, *supra* note 210.
[213] Plan of Desegregation for Calhoun County, Miss., approved by the Office of Education on July 13, 1965.
[214] *Ibid.*
[215] Interview by staff attorneys with J. E. Cook, *supra* note 198.
[216] *Ibid.*

One seventh grade girl stated that she was the only Negro in her homeroom class of 48 students. She declared that none of these students nor any other white pupil had befriended her, but that students had called her "nigger and other things" and had hit and teased her. She had never eaten lunch at school, she said, because she was afraid to enter the lunchroom and had been insulted when she had attempted to purchase food from a nearby store. At recess, she reported, she sat alone. She said she feared she would not be safe on the bus and therefore had never used it. According to this girl, school officials had never helped or asked how she was getting along. The girl, although still enrolled, had stopped attending the integrated school in late September.[217] In January 1966, she still was not in school.[218] The school board refused to let her transfer back to the Negro school and she remained at home.[219] The superintendent said that the policy of the school board was that once a choice is made, no transfer to another school will be allowed and that this policy was required by the Office of Education.[220] The girl had stated she had been first in her class the previous year and had selected the white school in the hope it would provide her with a better education.

The other two Negro pupils, a 10th grade girl and a 12th grade boy, told staff investigators they were determined to stay the entire year. The boy, who stated he had been threatened several times by a band of 10 white students, nevertheless expressed determination to graduate from the white school. In November the superintendent telephoned the Office of Education to report that shots had been fired into the houses of the two Negro students and threatening notes had been left from the Klan. Both students withdrew.[221]

Other instances of harassment also have been alleged. For example, the Lawyers' Committee for Civil Rights Under Law alleges that in Aberdeen, Miss., where the school district is desegregating under court order, the 12 Negro students attending the Aberdeen, Miss., High School have been subjected, "from the first day of the school year," to being "spat upon, tripped, kicked, bumped, and threatened and abused with profane and vulgar language." Among specific examples cited in the letter is an alleged beating administered to female Negro students by a "mob of white students, including part of the football team."[222] The Southern Education Reporting Service states that in East Jefferson Parish, La., 36 Negro students left East Jefferson Parish High School on September 27, alleging harassment by white students. The

[217] *Ibid.*
[218] Telephone interview with Mr. J. E. Cook, Supt. of Schools, Jan. 13, 1966.
[219] Interview by staff attorney with Mr. J. E. Cook, *supra* note 198.
[220] *Ibid.*
[221] Information from EEOP official file.
[222] Letter dated Jan. 26, 1966, to the mayor and five aldermen of Aberdeen, Miss.

Negro students were suspended but later ordered reinstated by a Federal court.[223]

C. Districts Submitting Form 441 Assurances of Compliance

There are 2,755 school districts—57 percent of all those in the 17 Southern and border States qualified for Federal financial assistance—which have qualified by submitting the standard assurance of compliance (Form 441).[224] Acceptance of this assurance by the Office of Education, according to the Statement of Policies, certifies the school board correctly has asserted that all "practices characteristic of dual or segregated school systems" have been eliminated.[225]

The percentage of school districts qualifying for Federal financial assistance by submitting accepted Form 441 is substantially higher in the border States than in the Deep South. In Missouri 97.6 percent of all the qualified school districts are covered by a Form 441; in Oklahoma 89.9 percent, in West Virginia 87.2 percent.[226]

A staff attorney visited three districts in Missouri qualified by Form 441s. In at least one of these districts some Negro pupils still were deliberately segregated by the school board. Caruthersville is the largest city in Pemiscot County, Mo. There are 2,133 students enrolled this year in six public schools, 769 of them (36 percent) Negroes.[227] In Caruthersville students still are assigned on a racial basis, although Negroes are given a right to transfer. Only 30 Negro students (4 percent) are regularly enrolled in class with white pupils.[228] Caruthersville maintains three elementary schools: one all-white, one all-Negro, and one 97.3 percent white.[229] There are two junior high schools: one 97.8 percent white and one all-Negro.[230] Administratively there is only one high school but actually there are two buildings and in effect two schools. One, 97 percent white, is known as Caruthersville High School. The other, all-Negro, is known as the 18th Street Center. Negro residences are concentrated in the southeastern section of the town and the all-Negro schools are side-by-side within the area. But not all Negroes live there. Some live a few blocks from an all-white elementary school in the northwest. Even many of those who reside within the "ghetto" live closer to the predominantly white elementary and secondary schools than the all-

[223] SERS, "Compilation," Sept. 1965, La. 1.
[224] Office of Education, "Boxscore," Jan. 3, 1966.
[225] Statement of Policies III.
[226] Office of Education, "Boxscore," Jan. 3, 1966.
[227] Interview by staff attorneys with Mr. V. W. Hill, Supt. of Schools, Nov. 1965.
[228] *Ibid.*
[229] *Ibid.*
[230] *Ibid.*

Negro schools. [231] Nevertheless, these Negroes attend the all-Negro schools.[232]

The 18th Street Center accents vocational education. Courses offered there in bricklaying, health, physiology, and family living are not offered at the formerly all-white high school. In contrast, Caruthersville High School, which has 15 Negroes enrolled with 481 white pupils, offers courses that are unavailable at the 18th Street Center; namely, physics, chemistry, trigonometry, journalism, some English courses, business law, a vocational agriculture program and a program entitled "Cooperative-Occupational-Educational," which permits students to obtain career oriented jobs which also carry academic credits.[233] Under school policy, any course offered at one high school building not taught at another is available upon request. No white students have availed themselves of the courses at the Center, but between 30 and 40 Negroes enrolled at the Center are carried by school bus each day between the schools.[234]

If Caruthersville had been required to submit a desegregation plan, it would have been obligated to provide for nonracial initial assignments. Instead, it is providing only a right to transfer from schools to which pupils are assigned on a racial basis.[235] And, although the Statement of Policies expressly states that a Form 441 assurance of compliance may not be executed by a school system in which "teachers or other staff who serve pupils remain segregated on the basis of the race, color, or national origin of the pupils in a school," all teachers at the Negro schools are Negro and all teachers at the white schools are white—except for some collateral positions.[236]

The out-of-district high school pupils received by Caruthersville from Dunklin County and McCarty, Mo.—neither of which maintain a high school—are assigned either to Caruthersville High School or 18th Street Center depending on their race.[237] This practice is maintained notwithstanding the fact that the Statement of Policies explicitly provides that a Form 441 assurance of compliance may not be executed by a school system in which "the race, color, or national origin of pupils is a factor in their initial assignment, reassignment, or transfer to a particular school". More than one-third (35 percent) of the Negro students at the Center are imported from Dunklin County or McCarty.[238] The school board takes the position that it is the obliga-

[231] *Ibid.*
[232] *Ibid.*
[233] *Ibid.*
[234] *Ibid.*
[235] *Ibid.*
[236] *Ibid.* One Negro directs physical education at the center and also serves as assistant football coach at Caruthersville High School. There are white art and music teachers and white elementary supervisors who serve all schools. (*Ibid.*)
[237] *Ibid.*
[238] *Ibid.*

tion of the home district to provide a desegregated education,[239] but the Statement of Policies does not distinguish out-of-district residents from residents of the district in precluding acceptance of Form 441s where students are racially assigned to schools within the district.

In Nashville and Howard County, Ark., there are two school districts covering approximately the same geographic area. All the white students are in the Nashville School District while all the Negro students are in the Childress School District. Both districts cover Nashville and Howard County. Both submitted Form 441 assurances of compliance which were accepted by the Office of Education.[240] The Southern School News reports that when six Negro boys asked to register at Nashville High, they were told by the superintendent that they lived in the Childress school district, not the Nashville district.[241]

D. Noncompliance by School Authorities With Accepted Desegregation Plans

In the course of their field investigations, Commission staff attorneys discovered several instances of noncompliance with accepted desegregation plans. The districts where noncompliance was found were not selected because complaints had been made but were chosen solely to obtain a reasonable cross section.

In Webster County, Miss., school officials assigned on a racial basis about 200 white and Negro students whose freedom of choice forms had not been returned to the school office, even though the desegregation plan stated that it was mandatory for parents to exercise a choice and that assignments would be based on that choice.[242] In McCarty, Mo., after the school board had distributed freedom of choice forms and students had filled out and returned the forms, the board ignored them. Since McCarty does not operate a high school, students in grades 9–12 were bused to Caruthersville, where they were assigned on a racial basis.[243]

As of October 1, 1965, Fayette County, Ky., maintained 26 schools serving 21,169 students, 1,309 of whom (6 percent) were Negroes.[244] Before 1956, all Negro students, regardless of where they resided in the county, had been required to attend either the all-Negro Douglass School, then housing grades 1–12, or a small one-teacher Negro school. In 1956, the one-teacher Negro school was closed and its elementary pupils were integrated into attendance zones previously established

[239] *Ibid.*
[240] SERS, "Compilation," Oct. 1965, Ark. 8, 9.
[241] *Id.* Sept. 1965, Ark. 24.
[242] Interview with Mr. F. E. Lucius, *supra* note 159.
[243] Interview with Mr. Floyd E. Hamlett, Supt. of Schools, Nov. 1965.
[244] Fayette County School District, "List of Integrated Schools, Elementary and Secondary Enrollment and Teachers" and "List of Schools With All White Pupil Enrollment and Teachers," Oct. 1, 1965.

for white children. Its students in grades 7–12 were assigned to Douglass, but were permitted to transfer to white schools in their attendance zones. In 1961, the transfer option for Negro students in grades 7–12 was eliminated. A zone was created for Douglass covering grades 1–12, and any Negro student not residing in that zone was assigned to the school in his neighborhood. Douglass students, all of whom were Negroes, in grades 7–12 now were permitted to transfer to another school only to obtain courses not offered at Douglass. In 1963, grades 9–12 were closed at Douglass and the Negro pupils in those grades were assigned to other schools on the basis of the same attendance zones as those applicable to white students.[245] Under the geographic zoning plan accepted by the Office of Education for the 1965–66 school year, Douglass was to serve all students in grades 1–8 residing within its attendance zone, and all other students were to be assigned to the schools in their attendance zones without regard to race.[246]

Staff attorneys discovered, however, that although 60 white students live within the Douglass school zone they did not attend, and never had attended, Douglass. Rather, the school district permitted these white students to attend predominantly white Linlee Elementary in grades 1–6 and then a white or predominantly white school in grades 7–8. This was accomplished under a transfer arrangement which also was available to Negroes at Douglass, but was not available to students in any other zone.[247] The arrangement failed to comply with the desegregation plan, which provided that: "All attendance areas in the system are drawn on rational geographic lines. The children are assigned to the facilities serving their zone of residence. Transfers are granted only where the school in the zone of residence does not offer a course desired by the transferring student, and the sought facility does." [248]

The Office of Education has conducted investigations of alleged noncompliance with desegregation plans in approximately 15 school districts, including districts in Alabama, Florida, Georgia, North Carolina, Arkansas, Tennessee, and Maryland.[249] Similar investigations now are being conducted in about 25 other school districts.[250]

E. Desegregation in Districts Under Court Order

About 200 lawsuits have been brought in the 12 years since the first *Brown* case, many of them against districts in which racial segregation

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[245] Interview by staff attorneys with Mr. G. S. Potts, Supt. of Schools, Nov. 1965.
[246] Plan of Desegregation for Fayette County, Ky., approved by the Office of Education on May 28, 1965.
[247] Interview with Mr. G. S. Potts, *supra* note 245.
[248] Plan of Desegregation for Fayette County, *supra* note 246.
[249] Discussion with EEOP officials.
[250] *Ibid.*

and attitudes of race superiority have been deeply entrenched. These school districts now automatically qualify for Federal aid whenever a final court order desegregating the schools has been entered in the litigation and the school district agrees to comply with the order and any modification of it.[251]

Although only 164 (3.4 percent) of the 4,941 school districts in the South have qualified by the court order route,[252] these districts include most of the major cities of the South and, accordingly, a large share of the population.[253] Court orders are a significant method of qualification particularly in Louisiana, where official resistance to compliance with Title VI has been most widespread.[254] In Louisiana, 32 court orders have been accepted, affecting 86.5 percent of the school districts judged qualified.[255]

Court orders contain widely divergent desegregation requirements. As a general rule, courts have not concerned themselves with all the issues covered in the Statement of Policies. With respect to those issues which are covered, generally less is compelled than is demanded by the Office of Education.

For example, Bay County, Fla., possesses a final court order dated July 20, 1964. It calls for desegregation of the first and second grades in 1965–66 and a grade a year thereafter. Desegregation will not be completed until 1975.[256] The Statement of Policies, on the other hand, requires school districts not under court order to complete desegregation by the 1967–68 school year.[257] Under the Bay County court order Negroes in the first and second grades have the right to attend the school nearest their homes. But application must be made during the last week in April at the school desired. If this option is not exercised, the racial assignment continues.[258] By contrast, under the Statement of Policies, a child entering the first grade who fails to exercise a choice is assigned nonracially.[259] Again, the court order, unlike the Statement of Policies, entirely reserves the question of teacher desegregation.[260] Under the court order the right of Negro students to "choose" white schools is subject to the Florida pupil placement law.[261] The Statement of Policies declares that the criteria of pupil placement laws shall not be used "to limit desegregation through restriction

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[251] Statement of Policies IV.
[252] Office of Education, "Boxscore," Jan. 3, 1966.
[253] Office of Education, "Court Order and Voluntary Desegregation Plans for Public School System," Cumulative List No. CV–61, Dec. 1, 1965.
[254] Only 37 of 67 districts in Louisiana—or 55.2 percent—have qualified, Office of Education, "Boxscore," Jan. 3, 1966.
[255] *Ibid.*
[256] *Youngblood* v. *Board of Public Instruction of Bay County,* Civil No. 572, N.D. Fla., July 20, 1964.
[257] Statement of Policies, VE(2)
[258] *Youngblood* v. *Board of Public Instruction of Bay County, supra* note 256.
[259] Statement of Policies, VD(3)(c).
[260] *Youngblood* v. *Board of Public Instruction of Bay County, supra* note 256.
[261] *Ibid.*

of any pupil's right to free choice." [262] The court order, moreover, permits the board to give priority in initial assignment "to children continuing an existing course of education" over those who live nearer the school—an impermissible restriction on free choice under the Statement of Policies.[263] And the court does not require desegregation of transportation, a precondition of approval of a plan by the Office of Education.[264]

Bay County operates 21 elementary, 3 junior high and 2 senior high schools. For the 1965–66 school year, there are 16,178 pupils, 2,883 of whom are Negroes. There are six schools, five elementary and a combined junior-senior high school, attended by Negro students exclusively. These all-Negro schools contain 2,843 pupils, 99 percent of all Negroes enrolled.[265]

Two school districts in Pemiscot County, Mo.—North Pemiscot R–1 and Deering C–6—desegregated under nearly identical court orders, both issued on July 1, 1963. The orders require the schools to be operated on a "nonracial basis" and specify that Negro students are to be permitted to "initially enroll or transfer" to the formerly segregated white schools. That is the extent of the court's injunction. There are no provisions for desegregation of teachers or staff, transportation or school facilities, programs, services, or activities.[266]

Deering operates two elementary schools and one high school for its 766 students. One school is segregated: the 53-pupil, all-Negro 1–6 grade, three-teacher Gobler Elementary. School officials concede Gobler is uneconomical to maintain and unnecessary. There is space for the students at Deering Elementary and, since Negroes are scattered throughout the district, Gobler lacks even the advantage of convenience. The school board has considered discontinuing Gobler.[267] Under the terms of the court order, its pupils may choose to transfer but, unlike the Statement of Policies, the court order contains no provisions for annual notice of opportunity for choice, or for distribution to parents and pupils of choice forms.[268] The same is true of the court order covering North Pemiscot R–1.[269]

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[262] Statement of Policies, VD(4)(b), (5)(b).
[263] *Youngblood* v. *Board of Public Instruction of Bay County*, *supra* note 258.
[264] Statement of Policies, VB(2).
[265] Bay County School District, "List of Schools With Enrollment," Fall 1965.
[266] *Wells* v. *Board of Education, District IV, Pemiscot County*, Civil No. 863 C21 (3), E.D. Mo., July 1, 1963; *Lewis* v. *Board of Education, Consolidated School District C–6, Derring, Pemiscot County*, Civil No. 863 C25 (3), E.D. Mo., July 1, 1963.
[267] Interview witth Ben T. Griffin, Supt. of Schools, Nov. 1965.
[268] *Lewis* v. *Board of Education*, *supra* note 266.
[269] *Wells* v. *Board of Education*, *supra* note 266.

VI. COMPLIANCE EFFORTS OF THE OFFICE OF EDUCATION

The only field investigations conducted by the Office of Education to determine whether there has been noncompliance with an accepted plan or assurance have occurred either where the Office of Education has received a complaint or where information has come to its attention indicating possible noncompliance. Until January 1966, no spot checks had been conducted.[270] In only one district submitting a Form 441 assurance of compliance—Dade County, Fla.—has the Office of Education, before accepting the assurance, conducted a field investigation to verify whether the district was actually in compliance with Title VI. Thus, the Office of Education has been unaware of noncompliance in districts from which no complaints have been received and about which it has received no information from outside sources. It has also been unaware of existing noncompliance in districts submitting assurances. It was unaware, for example, of the noncompliance uncovered by Commission staff attorneys in Webster County, Miss., Fayette County, Ky., and McCarty, Mo., and it was unaware, when it accepted the assurances of compliance submitted by the Caruthersville, Mo., school district and the Nashville and Childress school districts in Arkansas, that such districts were not in compliance with Title VI.[271]

Complaints of racial discrimination have been abundant. As of January 3, 1966, 517 complaints covering the provisions or operation of desegregation plans had been filed with the Office of Education from persons in the 17 Southern and border States.[272] Complaints of noncompliance with accepted desegregation plans involve some 150–200 alleged incidents.[273] In response to these complaints, the Office of Education has conducted field investigations in approximately 15 school districts. It is presently conducting either investigations of complaints or spot checks in approximately 25 others.[274] No field in-

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[270] Discussion with EEOP officials.
[271] *Ibid.*
[272] "Tabulation of Complaints," EEOP, January 1966. There had been 61 additional complaints dealing with the provisions or operation of court orders and 50 dealing with intimidation and harassment. Many of the complaints were cumulative. The Office of Education estimates that the complaints encompass a total of 350–400 separate incidents. Many complaints referred to desegregation plans still under negotiation and were resolved by Office of Education officials.
[273] Discussions with EEOP officials.
[274] *Ibid.*

vestigations have been conducted of complaints of noncompliance in the remaining school districts, although Office of Education officials have attempted to resolve these complaints by telephone calls or other communications.[275]

As of January 3, 1966, the Office of Education had commenced 65 enforcement proceedings against school districts believed to be in noncompliance with Title VI. Some of these districts have since come into compliance and at the present time 52 districts are carried as active cases. Noncompliance hearings to determine whether the districts are in violation have been held for each of the active cases. In all instances but one, enforcement action was taken because the district allegedly failed to file any plan or assurance. In the other case, involving Natchez, Miss., the district was cited for submitting an unacceptable court order.

Only 4 of the 52 hearings were contested. Of the 52 districts, 3 are in Alabama, 5 in Arkansas, 3 in Georgia, 27 in Louisiana, 13 in Mississippi, and 1 in South Carolina. Twenty-three additional noncompliance proceedings are under preparation by the Office of Education, 10 for Alabama, 3 for Louisiana, 3 for Mississippi, 1 for Oklahoma, 4 for South Carolina, and 2 for Tennessee.[276] Sixteen school districts in Alabama, Louisiana, and Mississippi have been found by hearing examiners to be in noncompliance with Title VI. They are, in Alabama: Barber and Bibb counties and Tarrant City;[277] in Mississippi: Warren, Wilkinson, Sunflower, Amite, and Copiah counties;[278] and in Louisiana: Tensas, Union, Vermilion, Webster, West Carroll, Winn, St. Bernard, and St. James parishes.[279]

No noncompliance proceedings have been commenced with respect to any school district for failure to comply with the provisions of a plan accepted by the Office of Education.[280]

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[275] *Ibid.*

[276] Office of Education, "Memorandum of Current Report of Activities Under Title VI of the Civil Rights Act of 1964," Jan. 3, 1966. On Sept. 24, 1965, the President directed the Attorney General to coordinate the Title VI activities of the Federal Government. Exec. Order No. 11247, 30 Fed. Reg. 12327 (1965). On December 27, 1965, the Attorney General transmitted new "Guidelines for the enforcement of Title VI" prepared by the Department of Justice to the heads of 21 departments and agencies with Title VI responsibilities. In his transmittal letter, the Attorney General urged "regular systematic inspections for possible discrimination to insure that the requirements of Title VI are in fact being observed by recipients of Federal assistance." The guidelines discuss the alternative courses of action open to Federal officials when there is noncompliance. They range from refusal to grant or termination of assistance to court enforcement, administrative action and attempts to obtain voluntary compliance. In his letter, the Attorney General declared:

> There should be no mistaking the clear intent and effect of the guidelines—Title VI must and will be enforced. Assistance will be refused or terminated to noncomplying recipients and applicants who are not amenable to other sanctions.

[277] Washington Post, Jan. 28, 1966, p. A6.

[278] *Id.* at Feb. 4, 1966, p. B2; New York Times, Feb. 8, 1966, p. 15.

[279] New York Times, Jan. 25, 1966, p. 34; Washington Post, Jan. 28, 1966, p. A6; New York Times, Feb. 8, 1966, p. 15.

[280] Discussions with EEOP officials.

VII. FINDINGS

The Commission finds that:

Extent of Integration

1. Under Title VI of the 1964 Civil Rights Act and the procedures adopted to implement it, significant progress has been made in securing the agreement of school districts to desegregate their schools. Among the communities which began desegregation in the 1965 school year were many where the prospect of school desegregation previously had seemed remote.

2. Despite a large increase in the number of school districts beginning desegregation in 1965, according to the highest estimate not more than 1 Negro child out of every 13 in the Deep South actually attends school with white children.

The Role of Freedom of Choice Plans

3. The slow pace of integration in the Southern and border States is in large measure attributable to the manner in which free choice plans—the principal method of desegregation adopted by school districts in the South—have operated.

4. Freedom of choice plans accepted by the Office of Education have not disestablished the dual and racially segregated school systems involved, for the following reasons:

a. Negro and white schools have tended to retain their racial identity;

b. White students rarely elect to attend Negro schools;

c. Some Negro students are reluctant to sever normal school ties, made stronger by the racial identification of their schools;

d. Many Negro children and parents in Southern States, having lived for decades in positions of subservience, are reluctant to assert their rights;

e. Negro children and parents in Southern States frequently will not choose a formerly all-white school because they fear retaliation and hostility from the white community;

f. In some school districts in the South, school officials have failed to prevent or punish harassment by white children of Negro children who have elected to attend white schools;

g. In some areas in the South where Negroes have elected to attend formerly all-white schools, the Negro community has been subjected to retaliatory violence, evictions, loss of jobs, and other forms of intimidation.

5. In some areas in the South, as the result of the harassment of Negro children electing to attend white schools and the intimidation to which the Negro community was subjected, all or many of the Negro children who originally had elected to attend white schools returned to the Negro schools.

Implementation of Title VI

6. Some school districts which have filed assurances of compliance accepted by the Office of Education are not actually in compliance.

7. Some school districts which have filed desegregation plans accepted by the Office of Education are not complying with the plans.

8. During 1965, the Office of Education did not have adequate procedures for evaluating plans and assurances.

9. During 1965, the Office of Education did not have adequate staff or procedures for detecting violations of Title VI through field inspection or by other means. Efforts of the Office of Education to monitor compliance were largely limited to investigations of complaints filed.

10. The commencement of enforcement proceedings under Title VI by the Office of Education has been virtually limited to cases where school districts openly defied the law by failing to file any assurance or plan. No enforcements proceedings have been instituted against districts for violation of an accepted plan or assurance.

Court Orders

11. The Office of Education has accepted promises to comply with court orders as qualifying a school district for Federal financial assistance under Title VI even when such orders fall far below standards required by that Office for school districts desegregating under voluntary plans.

VIII. RECOMMENDATIONS

1. The Office of Education should adopt policies and procedures which will ensure adequate evaluation of plans and assurances and adequate monitoring of compliance.

The adequacy of a particular desegregation plan frequently cannot be judged by examining only the four corners of the plan. A first-hand view and study of the school system may be required. For example, in order to judge whether a geographic zoning plan is racially discriminatory, it is necessary to know, among other things, whether school sites were selected and attendance zone lines drawn without regard to race. To evaluate plans properly, to determine whether assurances of compliance should be accepted, to monitor compliance effectively, and to ensure that plans and assurances are actually being followed, adequate investigation is required. The Office of Education should adopt policies and procedures which will ensure that these tasks are fulfilled. If additional funds are required, the Office of Education should seek to obtain them.

2. The Office of Education should make it clear that there are permissible means other than geographic rezoning and freedom of choice by which a school system may be desegregated.

Freedom of choice, geographic rezoning, or a combination of the two, are not necessarily the sole methods of desegregating a school system. The circumstances of individual school districts differ widely. In some school districts having small Negro populations and inadequate Negro schools it may be feasible to abandon the Negro schools and incorporate the Negro students and teachers into the formerly all-white schools. In a district with only two schools, one Negro and one white, it may be possible to use one as an elementary and the other as a secondary school. A school district may wish to construct a single large new school, or educational center, for all students in the district. There may be other ways to accomplish school desegregation in a particular school district.

3. Where there is doubt concerning the validity of a desegregation plan formulated by a school board, the Office of Edu-

cation should consider letting a contract with independent and objective educational or legal experts to review the plan and, if necessary, propose modifications or formulate a satisfactory substitute. The Commissioner of Education should explore the possibility of entering into such contracts under the authority of Title IV of the Elementary and Secondary Education Act of 1965.

Evaluation of a desegregation plan may be a complex task. If the Office of Education is in doubt concerning the validity of a plan formulated by a school board, it may wish to consider contracting with persons knowledgeable in education and law to review the plan in light of all relevant circumstances and to suggest modifications or formulate a substitute plan. Experts have been used to advantage in a number of school desegregation cases.[1]

4. The Office of Education should revise its standards governing free choice plans in light of experience accumulated thus far. The purpose of such revision should be to ensure that free choice plans are adequate to disestablish dual, racially segregated school systems and to achieve substantial integration within such systems. To this end, the Office of Education should consider rejecting free choice plans where the following circumstances exist:

(a) *where the school board has been operating under such a plan and there is evidence that Negro parents or their children effectively have been intimidated, threatened, or coerced as the result of exercising rights under the plan or in order to deter the exercise of such rights, or that school authorities are failing to prevent or punish harassment by white pupils of Negro pupils who have chosen formerly all-white schools;*

There is no "free" choice where Negro parents or pupils are intimidated by whites in the community in order to deter them from choosing formerly all-white schools or to punish them for having chosen such schools. Impediments to free choice exist also where school authorities fail to prevent or punish harassment by white pupils of Negro pupils who have chosen formerly all-white schools.

(b) *where the school authorities fail to present evidence that they are actively attempting to create a climate conducive to acceptance of the law;*

[1] Legal authority supporting this recommendation and, where appropriate, subsequent recommendations, are contained in the appendix to this survey.

Because the climate in which a free choice plan operates is critical to its success, a free choice plan should not be accepted unless the school authorities present a specific program for (1) encouraging Negroes to take advantage of their rights and (2) discouraging intimidation of Negro parents or pupils by the white community and harassment of Negro pupils by white pupils. Such a program should include meetings with parent-teachers' associations; full classroom briefings of children to prepare them for integration; encouragement and reassurance of the Negro community (in churches, for example); and efforts to enlist support from community organizations, public media, and law enforcement officials.

(c) *where the plan fails to (1) provide that, regardless of the grade involved, where space limitations make it impossible to honor every student's choice of schools, preference shall be given to those who live nearest the favored school, and (2) specify the objective criteria by which the school authorities will determine whether the favored school is overcrowded;*

(1) Under the existing Statement of Policies, freedom of choice plans to be acceptable must provide that where overcrowding results from choices made by pupils entering the first grade of elementary school system) that a Negro child who is about to enter grades 2, 3, 4, school, preference shall be given to pupils residing closest to the favored school or assignment shall be made on the basis of nonracial attendance zones. Should overcrowding result from the exercise of the transfer right possessed by pupils entering other grades, preference either must be given to pupils residing closest to the school or the pupil seeking the transfer must "be permitted to attend another school of his choosing within a reasonable distance of his residence."[2] The school board is given the option. In practice, this means (in a 6–3–3 school system) that a Negro child who is about to enter grades 2, 3, 4, 5 or 6 of elementary school, grades 8 or 9 of junior high school, or grades 11 or 12 of high school, cannot "bump" a white child already attending a white school, even though the Negro child lives closer to the white school. Although the Negro child supposedly has the right to attend another school of his choosing "within a reasonable distance of his residence,"[3] the provision discriminates against Negro pupils by perpetuating the vested rights of white pupils deriving from existing racial assignments.

[2] U.S. Office of Education (Dept. HEW), "General Statement of Policies Under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools," VD(5)(b), Apr. 1965.
[3] *Ibid.*

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The Office of Education should consider altering its requirements governing assignments of pupils at a particular school where space limitations preclude honoring the choice of each pupil who has chosen that school. Regardless of the grade involved, preference should be given to pupils residing nearest the school.

(2) The school board should not be given absolute discretion to determine when a school is "overcrowded" as the result of choices made. The Office of Education should consider eliminating the opportunity for manipulation of the "overcrowding" standard by requiring that the plan contain the objective criteria by which the school board proposes to judge whether overcrowding exists.

> (d) *where the choice is mandatory or where the plan does not provide that where a student fails to choose a school he must be assigned, regardless of the grade he is entering, to the school nearest his home or on the basis of nonracial attendance zones;*

Elimination of the dual or biracial attendance system requires that, where pupils fail to exercise a choice, they must be assigned on a nonracial basis. Under the Statement of Policies, however, a student in grades 2, 3, 4, 5, 6, 8, 9, 11, and 12 (in a 6–3–3 system) who fails to exercise his transfer right may be required to remain at the school he currently is attending and to which he has been assigned on a racial basis. In practice the Office of Education has permitted, and encouraged, school districts to require pupils to make a choice, and has accepted freedom of choice plans in which a choice is mandatory regardless of the grade that the pupils are entering. Mandatory free choice plans enable the Office of Education to know which pupils have exercised a choice. But they require all Negroes who wish to attend white schools to take affirmative action by checking the box signifying the white school. Because of community resistance to integrated schools and the fear and lack of initiative of large numbers of Negroes in the South, many Negroes have been reluctant to assert their rights affirmatively. Experience during the 1965–66 school year, in which the substantial majority of approved free choice plans were mandatory, shows that only a small percentage of Negro students in the South chose to attend school with white children. It is important to provide a means by which at least some Negroes who are reluctant to make an affirmative choice may nevertheless attend integrated schools, and to transfer to the school board the responsibility for the integration of such Negroes into white schools.

Therefore, the Office of Education should consider refusing to accept mandatory free choice plans and requiring that, where pupils fail to exercise a choice, they must be assigned on a nonracial basis. Al-

though a non-mandatory free choice plan is more difficult to enforce than a mandatory plan, adequate investigation should reveal any situations in which school boards refuse to honor choices made or assign on a racial basis children who fail to make a choice. Such school boards would be subject to Title VI sanctions, including the termination of Federal assistance.

(e) *where the plan fails to provide that teachers shall be assigned on a nonracial basis;*

Faculty desegregation is a necessary precondition of an acceptable free choice plan. A free choice plan cannot disestablish the dual school system where faculties remain segregated on the basis of the race of the teachers or the pupils. In such circumstances a school inevitably will remain identified as "white" and "Negro" depending on the color of its teachers.

The Office of Education should consider requiring that every free choice plan contain a provision securing actual desegregation of faculties. In desegregating faculties, of course, the school board would be under an obligation to ensure that all schools receive an equitable share of the most qualified teachers.

(f) *where the plan fails to provide an assurance that school authorities will discipline students who, during or without school hours, harass other students because they have chosen an integrated school.*

The Office of Education, like a district judge in a desegregation lawsuit, "must determine whether the means exist for the exercise of a choice that is truly free and not merely pro forma. This may involve considering, for example, . . . the opportunity to participate on equal terms in the life of the school after the pupil's arrival, and any other circumstances that may be pertinent." [4]

Should the above conditions be met, it may be that the central difficulty with free choice plans—their tendency to sustain all-Negro schools—will be eased. If intimidation and harassment of Negro parents and students are eliminated, if free choice is extended immediately to all grades, if teachers are no longer segregated, and if school authorities actively encourage Negroes to take advantage of their rights, the result should be the selection by Negroes, in larger numbers, of formerly all-white schools. The number of Negroes in formerly all-white schools would be supplemented by Negroes who exercise no

[4] *Bradley v. School Board of the City of Richmond*, 345 F. 2d 310 (4th Cir. 1965) (concurring opinion of Judges Sobeloff and Bell), *rev'd on other grounds*, 15 L ed 2d 187 (1965). It is, of course, the duty of educators as educators to stop breaches of discipline regardless of the type of desegregation plan under which the school district is operating.

choice but reside closer to formerly all-white schools. As a result of these factors, there may well be overcrowding at all of the formerly all-white schools. Should this happen, in those areas where some Negro pupils live closer to white schools than white pupils currently attending those schools, there would be some integration of the Negro schools as well as the white schools. At least where Negro schools were inferior, this might even result in demands by white persons for elimination of the Negro schools.

Eradication of the racial identification of all schools in the district is a necessary prerequisite to the workability of a free choice plan. Indeed, should the suggested preconditions for approval of free choice plans fail to accomplish this objective, it may become necessary to conclude that free choice plans do not under any circumstances provide a meaningful opportunity for desegregation and to reject them. It is recognized, of course, that the limitation or rejection of free choice plans may not result in the elimination of racial separation in schools. In such circumstances, a school district may elect to proffer a geographic zoning plan under which, because of residential segregation or other factors, little or no actual integration would be achieved. The problem of racial isolation in this context—a phenomenon which may exist both North and South—and its effect on quality education for all, will be explored by the Commission in a later report.

5. **The Office of Education should evaluate geographic rezoning plans in depth to determine whether they are racially discriminatory. Where a school board submits a geographic rezoning plan under which the racially segregated character of the schools would not be changed significantly, the board should be required affirmatively to demonstrate that the plan is not racially discriminatory in its purpose, operation, or effect.**

Evaluation of a plan for geographic rezoning of attendance areas to determine whether it is racially discriminatory in purpose or effect involves a careful examination of the attendance zone lines, the existing location of Negro and white residences in the district, natural boundaries and the location of the schools, transfer policies, and site selection policies. Again, local laws or ordinances requiring racial segregation in housing or education may affect the validity of the plan.

Where a school system is in an area where the schools previously have been operated in a discriminatory manner, it is necessary to ensure that the discrimination has been eliminated. Rezoning plans, therefore, should be evaluated carefully in light of all relevant considerations to determine whether they meet the requirements of Title VI.

Where the racially segregated character of the schools would not be changed significantly by the plan, the burden should be on the school board to show why the plan is not discriminatory.

6. The Office of Education should require school districts desegregating under court order to submit desegregation plans to the Office of Education which comply with the standards established by that Office for other school districts. Upon acceptance of the plan the school district should be required to file with the court a proposed decree consenting to modification of the original court order so that the school district thenceforth will be required to follow the desegregaion plan accepted by the Office of Education.

A court order requiring "desegregation" of a school system which falls below the standards set by the Office of Education in rate, method of assignment, or in any other respect, should not be accepted by the Office of Education unless the school district itself seeks modification of the order to conform to the Office of Education standards. It is inequitable for the Office of Education to permit a school district under court order to obtain funds even though it is required to do less than a comparable (perhaps adjacent) school district not under court order. Such a policy may encourage school districts to engage in litigation in order to avoid complying with Office of Education standards. In some cases, moreover, court orders are many years old and fall short of current judicial standards as well as the standards established by the Office of Education.

Conflict will be avoided by requiring the school districts to seek modification of the court decree. Only if the court does not agree to modify its decree should the Office of Education accept the court-established standards. Since the courts have attached great weight to the Office of Education standards [5]—and in the Fifth Circuit have held that they will follow those standards [6]—it is likely that the court would agree to modify its order.

7. The Office of Education should (a) require that a proposed plan of desegregation be published prominently in a newspaper of general circulation in the community, together with a notice that all interested parties are invited to ex-

[5] See *Singleton* v. *Jackson Municipal Separate School District*, 348 F. 2d 729 (5th Cir. 1965); *Price* v. *Denison Independent School District*, 348 F. 2d 1010 (5th Cir. 1965); *Kemp* v. *Beasley*, 352 F. 2d 14 (8th Cir. 1965).

[6] See *Singleton* v. *Jackson Municipal Separate School District*, *supra* note 5; *Price* v. *Denison Independent School District*, *supra* note 5.

press their comments, suggestions or objections to the Commissioner of Education in Washington, D.C., and (b) wherever necessary or desirable, solicit the views of interested parties in the locality.

A major deficiency in current Office of Education procedure is the failure to afford a channel for the expression by interested persons in the community of their views on whether a desegregation plan proposed by a school board should be accepted. Such persons may well have knowledge or points of view which otherwise would be unavailable to the Office of Education. A judge considers a desegregation plan when it is attacked by a party who presents evidence and gives reasons to show why it is defective. The Office of Education, on the other hand, faced with hundreds of plans, now considers each one in a vacuum. The Office of Education should make available a means of channeling criticism of the plan to Washington and may find it desirable to solicit such criticism where appropirate.

8. **The President should propose and Congress should enact legislation specifically authorizing the Attorney General and the victims to bring a civil action to enjoin private persons from harassing or intimidating Negro parents or children who seek to exercise rights under desegegation plans accepted by the Office of Education.**

Existing Federal law is inadequate to deal with harassment and intimidation of Negro parents and children who seek to exercise rights under desegregation plans accepted by the Office of Education. Although Title IV of the Civil Rights Act of 1964 authorizes the Attorney General, in certain circumstances, to initiate desegregation suits, the Title does not authorize him to bring suit against private individuals seeking to interfere with the efforts of a school board to comply with the law. A Title IV suit must be predicated upon a signed complaint by a parent or group of parents that his or their minor children "are being deprived by a school board of the equal protection of the laws. . . " (See 42 U.S.C. 2000c–6(a)(1)(1964)). A reconstruction statute (42 U.S.C. 1985(3) (1964)) provides that "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, . . . " the victim may bring a damage action against any one of the conspirators. Section 1985, however, essentially is a conspiracy statute. Harassment and intimidation are not necessarily conspiratorial in character. A single person may conceive a plot, wield a weapon, or make a threat. It makes little sense

to exempt him from accountability on the very ground that he bears undivided responsibility for the misdeed. More fundamentally, the victim of intimidation may be too poor or too frightened to bring a lawsuit (which under existing law would be confined in any event to an action for damages). As in the fields of voting (42 U.S.C. 1971(c)) and public accommodations (42 U.S.C. 2000a–5) the Attorney General should be the guardian of the victim's rights and should be authorized (as should the victim) to bring an action for preventive relief.

Concurring Statement of Commissioner Hesburgh

There are a few additional points which I think must be made to put the above recommendations into perspective.

There are two problems, quite distinct and vastly different, that confront America as it works toward desegregation in elementary and secondary education. One problem is that of *de facto* segregation, caused in part by segregated housing patterns, and all the concomitant social consequences of the ghetto. This problem will be treated by the Commission in a later report, requested by President Johnson. The second problem, the focus of this report and its recommendations, is that of abolishing the *de jure*, dual system of elementary and secondary education that has long existed and has long been sanctioned by law and custom in the South. The first move toward a solution of this second problem was to declare that the *de jure*, dual educational system was wrong, undemocratic, and un-American. The *Brown* decision in large measure did this. But practically nothing happened in fact. There were a few plans for desegregation, mostly in the border States, fewer moves, and plenty of lawsuits. Ten years after the *Brown* decision, a small fraction of the southern Negro students were enrolled in formerly all-white schools.

Title VI of the Civil Rights Act of 1964 promised greater progress in this area, for it said to the school system formerly segregated *de jure:* desegregate or Federal funds may be cut off. In implementing Title VI, the Office of Education has permitted such school systems to desegregate by giving students freedom of choice. Our report suggests measures to make such a choice more meaningful. But there is a problem, with which the present report does not deal but which nevertheless must be overcome if freedom of choice is to be a fair and realistic way of breaking up the dual school systems of the South. The problem stems from the fact that many Negro schools in the South are inferior to their white counterparts. All school systems have a finite number of schools and most have a total pupil capacity approximating the total number of potential students. If all the Negro parents, or an appreciable proportion of them, elect to send their children

to the formerly all-white schools, as is their right, I assume the only place the displaced white students can go is to the formerly all-Negro, presumably inferior schools. The reluctance of white parents to send their children to Negro schools suggests to me that the remedy must be sought not only in establishing systems of nonracial assignment, but in improving the quality of the schools. Thus, it is important to stress not merely the steps which must be taken in good conscience to comply with the law, but our commitment to positive measures which will mean better education for all in a context of equal opportunity for all. Our main concern, at this point in American history, should be that all schools are improving. All would then become equally desirable. Fundamentally, this means better teachers, better facilities, better educational programs for all Americans, North and South, white and Negro.

A realistic and quite possible approach to this is, I think, through the immediate improvement of all teachers of each race, beginning with those who most need assistance in being better qualified as teachers.

At this precise time of transition, why not institute along with the whole process of desegregation in the South a positive program of upgrading all teachers in the present systems? In fact, the best teachers of either race, worthy of their profession, should be put in the schools needing the most help to improve. One might even think of rotating teachers within the schools of a given district. There is already the existing pattern of academic year and summer institutes for just this purpose of improving teachers. To enlarge this practice, we need the adding on of Federal funds in the South, provided that the local communities are committed to one good school system for all the children of the local community.

If this positive action could be moved along quickly, with good will from all concerned, school administrators, parents, and students, then we could eliminate the present cat-and-mouse game which is going on between the Federal Office of Education and the local Southern school districts. In fact, I have a feeling that the South could solve its problem long before the North, which has an educational desegregation problem which may be less amenable to solution because of entrenched patterns of housing segregation.

Concurring Statement of Commissioner Patterson

I wish to concur in Father Hesburgh's view: that while we are dealing in this survey with a short-term problem of compliance with a law, the long-term problem will not be answered by merely shifting students from one school to another. As long as we have bad schools and good schools, we will still have dual schools, regardless of their racial composition. I do not think social tensions will be relieved until we improve the bad schools, not simply repopulate them. I feel, therefore, that his survey is concerned largely with policing up the legal periphery of a vast substantive field into which we must yet go to find satisfactory and enduring answers. It is my hope that the Commission's comprehensive national study of racial isolation in the schools, being undertaken currently at the request of the President, will impel movement into the broader field.

With respect to the more limited survey at hand, I think it well to emphasize a point which it makes at the outset: That Southern schools made significant progress toward desegregation in 1965. It is true that the highest estimate of the number of Southern Negro children enrolled in white schools was still only 7.5 percent. It is also true that freedom of choice plans were found to be used in some schools as devices to maintain segregation.

But I think it well to emphasize that freedom of choice plans were also widely used across the South as devices to inaugurate desegregation. As the survey notes, 98 percent of all the school districts in the 17 Southern and border States have now been certified as qualified to receive Federal funds. Of these 4,823 school districts, no less than 1,563 adopted a policy of desegregation for the first time. I find this an impressive figure, a meaningful beginning. Even though Negro enrollment in the first year was predictably low, it indicates to me not that most communities of the South have caviled but that they have met their test well, made their basic decision to comply with the law, and passed their most difficult time, so that good faith and fairness toward all of the South's school children need not any longer be an issue.

Investigation shows the issue does remain unsettled in some school districts; it is largely to those that the recommendations growing out of this survey are addressed.

APPENDIX

Recommendation No. 3

In a number of school desegregation cases experts have been used to advantage. See *Dowell* v. *School Board of Oklahoma City Public Schools*, 244 F. Supp. 971 (W.D. Okla. 1965); *Taylor* v. *Board of Education of New Rochelle*, 191 F. Supp. 181 (S.D.N.Y. 1961); *Jackson* v. *School Board of City of Lynchburg*, 203 F. Supp. 701 (W.D. Va. 1962).

Title IV of the Elementary and Secondary Act of 1965, 70 Stat. 27 (1965) appears to authorize the Office of Education to enter into contracts with independent experts for the purpose suggested. Pursuant to Section 401 of the act, the Commissioner of Education is "authorized to make grants to universities and colleges and other public or private agencies, institutions, and organizations and to individuals for research, surveys, and demonstrations in the field of education. . . ."

Recommendation No. 4(a)

Several courts have indicated that freedom of choice plans would not be acceptable if intimidation of Negro parents or students in connection with their choice of a formerly all-white school were shown. A Federal court in Virginia recently suggested that a freedom of choice plan would be unacceptable where there was "widespread hostility in the white community which might result in economic or other reprisals to a Negro parent who assumes the initiative in sending his child to a predominantly white school . . .".[1] Earlier, a Federal court in Tennessee had declared that "in the event . . . economic or other pressure, overtly or covertly, is brought to bear on Negro parents and students (to prevent the exercise of a free choice), this Court . . . might find it necessary to eliminate the choice provision from the plan in order to effectuate the mandate of the Supreme Court in the Brown decisions."[2] Similarly, the Sixth Circuit stated that appropriate "modification" of a decree incorporating a free choice desegregation plan would be necessary upon a showing "that there are impediments to the exercise of a free choice. . . ."[3]

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[1] *Kier* v. *County School Board of Augusta County*, Civil No. 65-C-5-H, W.D. Va., January 5, 1966.

[2] *Vick* v. *County Board of Education of Obion County*, 205 F. Supp. 436, 440 (W.D. Tenn. 1962).

[3] *Kelly* v. *Board of Education of City of Nashville*, 270 F. 2d 209, 230 (6th Cir. 1959), *cert. denied*, 361 U.S. 924 (1959).

Recommendation No. 4(b)

In *Bradley* v. *School Board of the City of Richmond*, 345 F. 2d 310, 323 (4th Cir. 1965), Judges Sobeloff and Bell, concurring, said:

> A plan of desegregation is more than a matter of words. The attitude and purpose of public officials, school administrators and faculties are an integral part of any plan and determine its effectiveness more than the words employed. If these public agents translate their duty into affirmative and sympathetic action the plan will work; if their spirit is obstructive, or at best negative, little progress will be made, no matter what form of words may be used.

Recommendation No. 4(c)

The courts have held that, regardless of the grade involved, where space limitations preclude honoring every student's choice of school, preference should be given to children living nearest the favored school. In *Gaines* v. *Dougherty County Board of Education*, 334 F. 2d 983, 985 (5th Cir. 1964), the court ordered that each child attending the first or second grade in the county public system (the only two grades reached by the plan) should have free choice of schools to attend and provided further that "if there is insufficient space in any school as a result of the making of such choice, preference in granting such choice shall be solely on the basis of proximity of the child to the school." In *Stell* v. *Savannah-Chatham County Board of Education*, 333 F. 2d 55, 65 (5th Cir. 1964), *cert. denied*, 379 U.S. 933 (1964), the court, in reviewing a plan to desegregate the public school system of Savannah and Chatham County, Ga., had held that "any plan of assignment and transfer must be applied without regard to race in an even handed manner." The court cited with approval that section of the plan instituted by Atlanta, Ga., dealing with freedom of choice:[4]

> Left in the Atlanta Plan as used for assignment and transfer was only the choice of a school by the pupil, and availability of space in the school chosen, *with priority where space for all is not available to be based on proximity of residence to school.* This freedom of choice, with schools no longer being designated as white or Negro, *in the grades to which the plan of desegregation has reached* means that each child in the system may attend the school he chooses to attend, without regard to race so long as space is available in the school, and where it is not available to all it is to be awarded on the basis of proximity of the residence of the pupil to the school. (Emphasis added.)

Recommendation No. 4(d)

There are many judicial decisions recognizing that when a grade is reached by a desegregation plan, assignment of students in that grade should be made on a nonracial basis. The Fifth Circuit has held that "a necessary part of any plan is a provision that the dual or bi-racial

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[4] 333 F. 2d at 65. See also *Armstrong* v. *Board of Education of City of Birmingham*, 333 F. 2d 47 (5th Cir. 1964). The freedom of choice plans adopted in *Gaines* and *Stell* were cited with approval in *Lockett* v. *Board of Education of Muscogee County School District*, 342 F. 2d 225 (5th Cir. 1965).

school attendance system, i.e., separate attendance areas, districts or zones for the races, shall be abolished contemporaneously with the application of the plan to the respective grades when and as reached by it."[5] Although the Fourth Circuit has upheld a plan under which a pupil who fails to exercise a choice remains at the school to which he originally was assigned on the basis of his race,[6] the Eighth Circuit has held to the contrary, specifically ruling that:[7]

> **The continuation of the dual attendance areas wherein whites are required to attend all-white schools and Negroes are required to attend all-Negro schools should they fail to elect otherwise is unconstitutional and must be remedied.**

Recommendation No. 4(e)

As the Office of Education has recognized in the present Statement of Policies, the Commissioner of Education may require desegregation of faculty because faculty segregation impairs the rights of students to education free from racial considerations. It was suggested by Senator Humphrey in the debates on Title VI that the Commissioner of Education would be authorized to require faculty desegregation. He stated that "the Commissioner might also be justified in requiring elimination of racial discrimination in employment or assignment of teachers, at least where such discrimination affected the educational opportunities of students." 110 Cong. Rec. 6545 (1964). See *Board of Public Instruction of Duval County* v. *Braxton*, 326 F. 2d 616, 620 (5th Cir. 1964), *cert. denied*, 377 U.S. 924 (1964); *Rogers* v. *Paul*, 345 F. 2d 117, 125 (8th Cir. 1965), *vacated and remanded*, 15 L ed 2d 265 (1965); *Lockett* v. *Board of Education of Muscogee County School District*, 342 F. 2d 225 (5th Cir. 1965); *Bradley* v. *School Board of City of Richmond*, 345 F. 2d 310 (4th Cir. 1965), *rev'd*, 15 L ed 2d 187 (1965); *Northcross* v. *Board of Education of City of Memphis*, 333 F. 2d 661 (6th Cir. 1964); *Jackson* v. *School Board of City of Lynchburg*, 321 F. 2d 230 (4th Cir. 1963); *Mapp* v. *Board of Education of City of Chattanooga*, 319 F. 2d 571 (6th Cir. 1963); *Augustus* v. *Board of Public Instruction of Escambia County*, 306 F. 2d 862 (5th Cir. 1962).

Recently a Federal district court in Virginia, in approving a free choice plan, recognized that faculty segregation perpetuated the racial identity of the schools and required the immediate desegregation of teachers and staff. The court's decree stipulated that insofar as

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[5] *Stell* v. *Savannah-Chatham County Board of Education*, 333 F. 2d 55, 64 (5th Cir. 1964) *cert. denied*, 379 U.S. 933 (1964). See also *Armstrong* v. *Board of Education of City of Birmingham*, *supra* note 4, at 51; *Davis* v. *Board of School Commissioners of Mobile County*, 333 F. 2d 53 (5th Cir. 1964); *Bush* v. *Orleans Parish School Board*, 308 F. 2d 491 (5th Cir. 1962); *Augustus* v. *Board of Public Instruction of Escambia County*, 306 F. 2d 862 (5th Cir. 1962).

[6] *Bradley* v. *School Board of the City of Richmond*, 345 F. 2d 310 (4th Cir.), *rev'd on other grounds*, 15 L ed 2d 187 (1965).

[7] *Kemp* v. *Beasley*, 352 F. 2d 14, 22 (8th Cir. 1965).

possible, the percentage of Negro teachers in each school should approximate the percentage of Negro teachers in the entire system for the 1965–66 school season.[8] See also *Dowell* v. *School Board*, 244 F. Supp. 971, 977–78 (W.D Okla. 1965).

Recommendation No. 5

In several cases the courts have invalidated geographic zoning arrangements upon determining that they were racially discriminatory in their intent, operation, or effect. The Sixth Circuit, for example, held that in Memphis the school authorities, in rezoning the schools purportedly to accomplish desegregation, had gerrymandered the zone lines in an attempt to preserve racial segregation. The court rejected the contention that "drawing zone lines in such a manner as to disturb the people as little as possible is a proper factor in rezoning the schools."[9] And a Federal court in North Carolina ordered desegregation of the Durham schools after having found that school zone lines had "been drawn along racial residential lines, rather than along natural boundaries or the perimeters of compact area surrounding particular schools."[10] Present or past laws or ordinances requiring racial segregation in housing or education, considered in tandem with a particular geographic zoning plan, also may render the plan repugnant to constitutional requirements.[11]

In *Northcross* v. *Board of Education of City of Memphis*, 333 F. 2d 661, 664 (6th Cir. 1964), the court held that the burden of proof is on the school district to demonstrate that geographic rezoning lines were not drawn for the purpose of preserving segregation.

Recommendation No. 6

In *Singleton* v. *Jackson Municipal Separate School District*, 348 F. 2d 729, 731 (5th Cir. 1965) the Fifth Circuit said:

> If in some district courts judicial guides for approval of a school desegregation plan are more acceptable to the community or substantially less burdensome than H.E.W. guides, school boards may turn to the Federal courts as a means of circumventing the H.E.W. requirements for financial aid. Instead of a uniform policy relatively easy to administer, both the courts and the Office of Education would have to struggle with individual school systems on [an] ad hoc basis. If judicial standards are lower than H.E.W. standards, recalcitrant school boards in effect will receive a premium for recalcitrance; the more the intransigence, the bigger the bonus.

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[8] *Kier* v. *County School Board of Augusta County*, *supra* note 1.
[9] *Northcross* v. *Board of Education of City of Memphis*, 333 F. 2d 661, 664 (6th Cir. 1964).
[10] *Wheeler* v. *Durham City Board of Education*, Civil No. C–54–D–60, M.D. N.C., August 3, 1964.
[11] *Holland* v. *Board of Public Instruction of Palm Beach County*, 258 F. 2d 730 (5th Cir. 1958); *Dowell* v. *School Board of Oklahoma City Public Schools*, 244 F. Supp. 971 (W.D. Okla. 1965).

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